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FORTY-SEVENTH

ANNUAL REPORT

OF THE

NATIONAL LABOR RELATIONS BOARD

FOR THE FISCAL YEAR

ENDED SEPTEMBER 30

1982

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1982

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LETTER OF TRANSMITTAL

NATIONAL LABOR RELATIONS BOARD,
Washington, D.C., 25 February 1986.

SIR: As provided in section 3(c) of the Labor Management Relations Act, 1947, I submit herewith the Forty-Seventh Annual Report of the National Labor Relations Board for the fiscal year ended September 30, 1982.

Respectfully submitted,

DONALD L. DOTSON, *Chairman*

THE PRESIDENT OF THE UNITED STATES
THE PRESIDENT OF THE SENATE
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES
Washington, D.C.

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ERRATA

Notice to Holders of Forty-Sixth Annual Report for Fiscal Year 1981

The statistical information on page 217 (Table C) in the Annual Report for fiscal year 1981 was duplicated on page 215. The correct page 215 appears at the end of this book.

I

Operations In Fiscal Year 1982

A. Summary

The National Labor Relations Board, an independent Federal agency, initiates no cases: it acts only upon those cases brought before it. All proceedings originate from filings by the major segment of the public covered by the National Labor Relations Act—men and women workers, labor unions, and private employers who are engaged in interstate commerce. During fiscal year 1982, 47,210 cases were received by the Board.

The public filed 38,097 charges alleging that business firms or labor organizations, or both, committed unfair labor practices prohibited by the statute which adversely affected hundreds of thousands of employees. The NLRB during the year also received 8,581 petitions to conduct secret-ballot elections in which workers in appropriate groups select or reject unions to represent them in collective bargaining with their employers. Also, the public filed 532 amendment to certification and unit clarification cases.

After the initial flood of charges and petitions, the flow narrows because the great majority of the newly filed cases are resolved—and quickly—in NLRB's national network of field offices by dismissals, withdrawals, agreements, and settlements.

At the end of fiscal year 1982, the five-member Board was composed of Chairman John R. Van de Water and Members John H. Fanning, Howard Jenkins, Jr., Don A. Zimmerman, and Robert P. Hunter. William A. Lubbers was the General Counsel.

Statistical highlights of NLRB's casehandling activities in fiscal 1982 include:

- The NLRB conducted 5,116 conclusive representation elections among some 257,599 employee voters, with workers choosing labor unions as their bargaining agents in 40.3 percent of the elections.
- Although the Agency closed 45,103 cases, 28,423 cases were pending in all stages of processing at the end of the fiscal year. The closings included 36,424 cases involving unfair labor practice charges and 7,952 cases affecting employee representation.
- Settlements, avoiding formal litigation while achieving the goal of equitable remedies in unfair labor practice situations, num-

bered 9,959. Only on two previous occasions has this total been exceeded.

- The amount of $30,403,617 in reimbursement to employees illegally discharged or otherwise discriminated against in violation of their organizational rights was obtained by the NLRB from employers and unions. This total was for lost earnings, fees, dues, and fines. The NLRB obtained 6,332 offers of job reinstatements, with 3,731 acceptances.
- Acting upon the results of professional staff investigations, which produced a reasonable cause to believe unfair labor practices had been committed, regional offices of the NLRB issued 4,126 complaints, setting the cases for hearing.

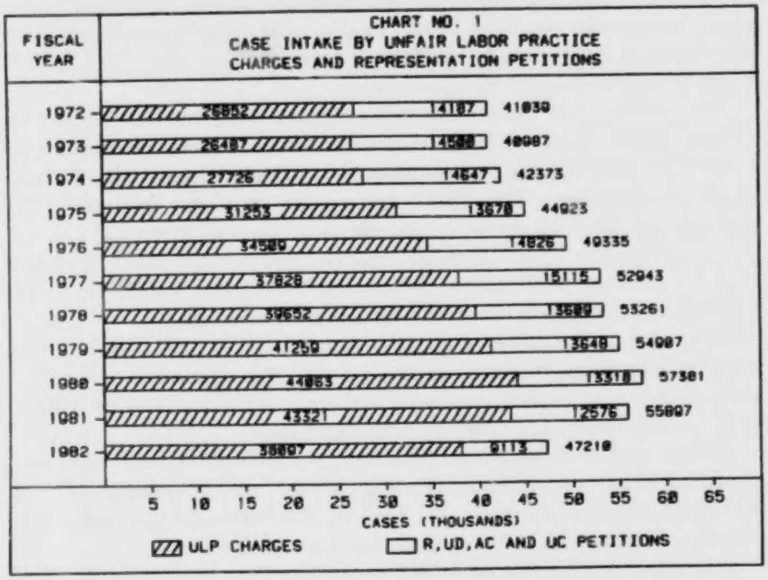


CHART NO. 1
CASE INTAKE BY UNFAIR LABOR PRACTICE
CHARGES AND REPRESENTATION PETITIONS

- NLRB's corps of administrative law judges, below the authorized number of positions due to retirements, deaths, and recruitment difficulties, issued 1,122 decisions.

NLRB Administration

The National Labor Relations Board is an independent Federal agency created in 1935 by Congress to administer the basic law governing relations between labor unions and business enterprises engaged in interstate commerce. This statute, the National Labor

Relations Act, came into being at a time when labor disputes could and did threaten the Nation's economy.

Declared constitutional by the Supreme Court in 1937, the Act was substantially amended in 1947, 1959, and 1974, each amendment increasing the scope of the NLRB's regulatory powers.

The purpose of the Nation's primary labor relations law is to serve the public interest by reducing interruptions in commerce caused by industrial strife. It seeks to do this by providing orderly processes for protection and implementing the respective rights of employees, employers, and unions in their relations with one another. The overall job of the NLRB is to achieve this goal through administration, interpretation, and enforcement of the Act.

In its statutory assignment, the NLRB has two principal functions: (1) to determine and implement, through secret-ballot elections, the free democratic choice by employees as to whether they wish to be represented by a union in dealing with their employers and, if so, by which union, and (2) to prevent and remedy unlawful acts, called unfair labor practices, by either employers or unions or both.

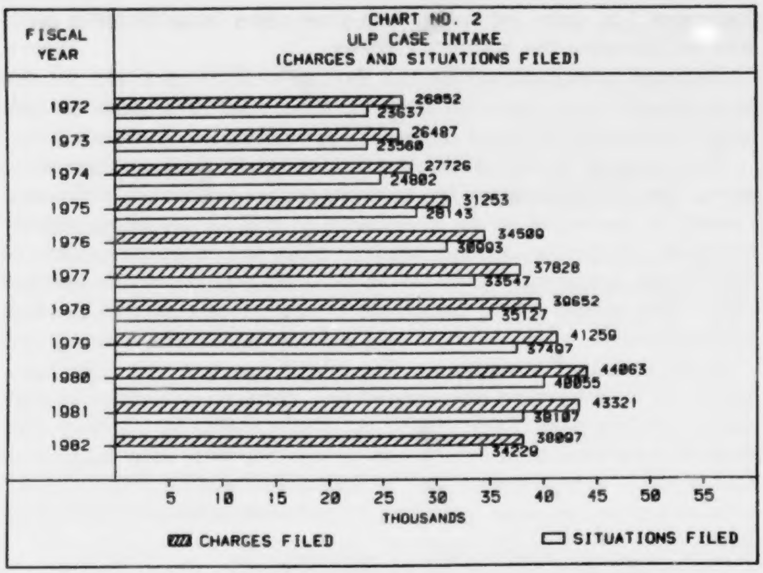
The NLRB does not act on its own motion in either function. It processes only those charges of unfair labor practices and petitions for employee elections which are filed in the NLRB's regional, subregional, and resident offices, which numbered 52 during fiscal year 1982.

The Act's unfair labor practice provisions place certain restrictions on actions of employers and labor organizations in their relations with employees, as well as with each other. Its election provisions provide mechanics for conducting and certifying results of representation elections to determine collective-bargaining wishes of employees, including balloting to determine whether a union shall continue to have the right to make a union-shop contract with an employer.

In handling unfair labor practice cases and election petitions, the NLRB is concerned with the adjustment of labor disputes either by way of settlements or through its quasi-judicial proceedings, or by way of secret-ballot employee elections.

The NLRB has no independent statutory power of enforcement of its decisions and orders. It may, however, seek enforcement in the U.S. courts of appeals, and parties to its cases also may seek judicial review.

NLRB authority is divided by law and by delegation. The five-member Board primarily acts as a quasi-judicial body in deciding cases on formal records. The General Counsel, who, like each Member of the Board, is appointed by the President, is responsible



for the issuance and prosecution of formal complaints in cases leading to Board decisions and has general supervision of the NLRB's nationwide network of field offices.

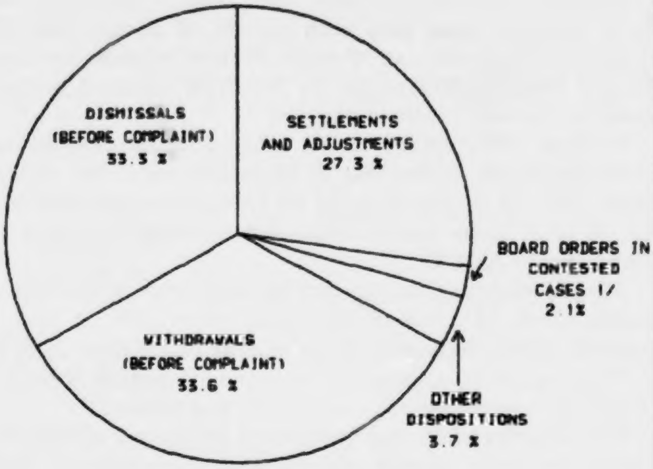
For the conduct of its formal hearings in unfair labor practice cases, the NLRB employs administrative law judges who hear and decide cases. Administrative law judges' decisions may be appealed to the Board by the filing of exceptions. If no exceptions are taken, the administrative law judges' orders become orders of the Board. Due to its huge caseload of unfair labor practice proceedings, the need for additional administrative law judges remained an acute operational problem during fiscal year 1982.

As noted, all cases coming to the NLRB begin their processing in the regional offices. Regional directors, in addition to processing unfair labor practice cases in the initial stages, also have the authority to investigate representation petitions, to determine units of employees appropriate for collective-bargaining purposes, to conduct elections, and to pass on objections to conduct of elections. There are provisions for appeal of representation and election questions to the Board.

CHART NO. 3

DISPOSITION PATTERN FOR UNFAIR LABOR PRACTICE CASES
(BASED ON CASES CLOSED)

FISCAL YEAR 1982



1/ CONTESTED CASES REACHING BOARD MEMBERS FOR DECISIONS

B. Operational Highlights

1. Unfair Labor Practices

Charges that business firms, labor organizations, or both have committed unfair labor practices are filed with the National Labor Relations Board at its field offices nationwide by employees, unions, and employers. These cases provide a major segment of the NLRB workload.

Following their filing, charges are investigated by the regional professional staff to determine whether there is reasonable cause to believe that the Act has been violated. If such cause is not found, the regional director dismisses the charge or it is withdrawn by the charging party. If the charge has merit, the regional director seeks voluntary settlement or adjustment by the parties to the case to remedy the apparent violation; however, if settlement efforts fail, the case goes to hearing before an NLRB administrative law judge and, lacking settlement at later stages, on to decision by the five-member Board.

Of major importance is that more than 90 percent of the unfair labor practice cases filed with the NLRB in the field offices are disposed of in a median of some 40 days without the necessity of formal litigation before the Board. Only about 2 percent of the cases go through to Board decision.

In fiscal 1982, 38,097 unfair labor practice charges were filed with the NLRB, a decrease of 12 percent from the 43,321 filed in fiscal 1981. In situations in which related charges are counted as a single unit, there was a 10-percent decrease from the preceding fiscal year. (Chart 2.)

Alleged violations of the Act by employers were filed in 27,749 cases, about 11 percent less than the 31,273 of 1981. Charges against unions decreased 14 percent to 10,278 from 11,917 in 1981.

There were 70 charges of violation of section 8(e) of the Act, which bans hot-cargo agreements. (Tables 1A and 2.)

The majority of all charges against employers alleged illegal discharge or other discrimination against employees. There were 14,732 such charges, or 53 percent of the total charges that employers committed violations.

Refusal to bargain was the second largest category of allegations against employers, comprising 10,898 charges, or about 39 percent of the total charges. (Table 2.)

Of charges against unions, the majority (7,354) were alleging illegal restraint and coercion of employees, about 72 percent, about the same as last year. There were 1,911 charges against unions for illegal secondary boycotts and jurisdictional disputes, a decrease of 20 percent from the 2,392 of 1981.

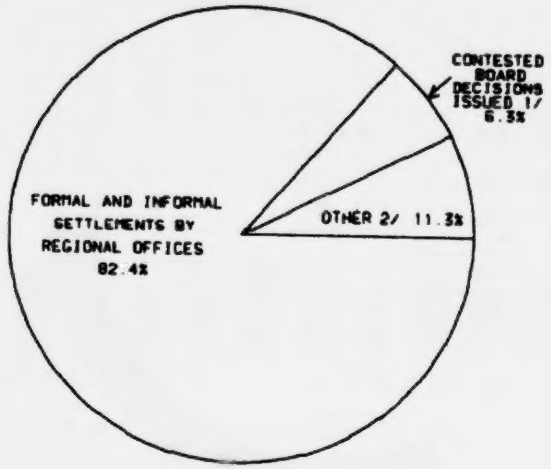
There were 1,514 charges (about 15 percent) of illegal union discrimination against employees, virtually the same as in 1981. There were 375 charges that unions picketed illegally for recognition or for organizational purposes, compared with 454 charges in 1981. (Table 2.)

In charges filed against employers, unions led with 62 percent of the total. Unions filed 17,161 charges, individuals filed 10,570, and employers filed 18 charges against other employers.

CHART NO. 3A

DISPOSITION PATTERN FOR MERITORIOUS
UNFAIR LABOR PRACTICE CASES
(BASED ON CASES CLOSED)

FISCAL YEAR 1982



1/ FOLLOWING ADMINISTRATIVE LAW JUDGE DECISION, STIPULATED RECORD OR SUMMARY JUDGMENT RULING

2/ COMPLIANCE WITH ADMINISTRATIVE LAW JUDGE DECISION, STIPULATED RECORD OR SUMMARY JUDGMENT RULING

As to charges against unions, 6,444 were filed by individuals, or 63 percent of the total of 10,278. Employers filed 3,343, and other unions filed the 491 remaining charges.

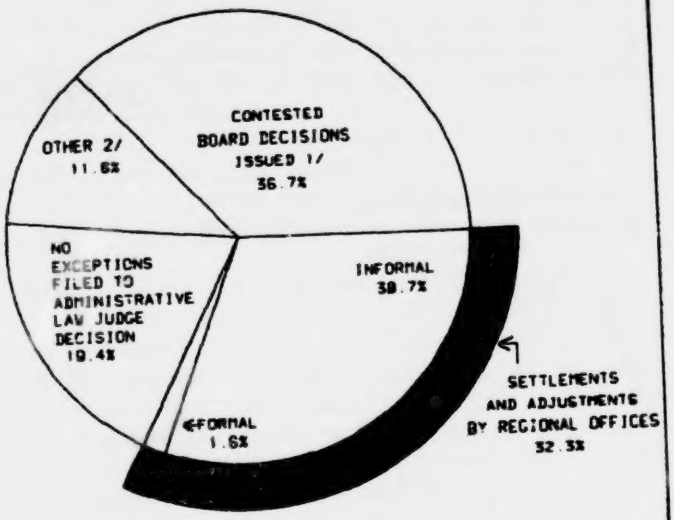
In fiscal 1982, 36,424 unfair labor practice charges were closed. Some 94 percent were closed by NLRB regional offices, unchanged from 1981. During the fiscal year, 27.3 percent of the cases were settled or adjusted before issuance of administrative law judges' decisions, 33.6 percent by withdrawal before complaint, and 33.3 percent by administrative dismissal.

In evaluation of the regional workload, the number of unfair abor practice charges found to have merit is important—the

CHART NO. 3B

DISPOSITION PATTERN FOR UNFAIR LABOR PRACTICE CASES AFTER TRIAL (BASED ON CASES CLOSED)

FISCAL YEAR 1982



1/ FOLLOWING ADMINISTRATIVE LAW JUDGE DECISION, STIPULATED RECORD OR SUMMARY JUDGMENT RULING

2/ DISMISSALS, WITHDRAWALS AND OTHER DISPOSITIONS

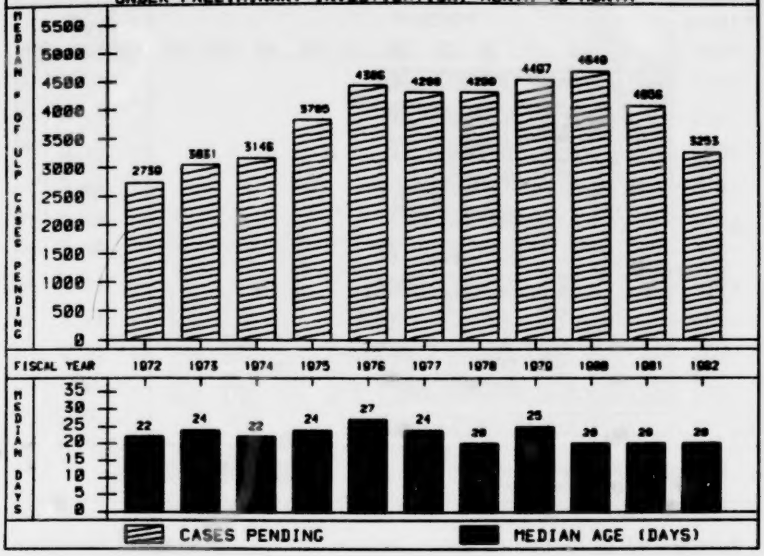
higher the merit factor the more litigation required. Some 32 percent of the unfair labor practice cases were found to have merit.

When the regional offices determine that charges alleging unfair labor practices have merit, attempts at voluntary resolution are stressed—to improve labor-management relations and to reduce NLRB litigation and related casehandling. Settlement efforts have been successful to a substantial degree. In fiscal 1982, precomplaint settlements and adjustments were achieved in 5,977 cases, or 16.6 percent of the charges. In 1981 the percentage was 16.3.

Cases of merit not settled by the regional offices produce formal complaints, issued on behalf of the General Counsel. This action

CHART NO. 4

NUMBER AND AGE OF UNFAIR LABOR PRACTICE CASES PENDING UNDER PRELIMINARY INVESTIGATION, MONTH TO MONTH

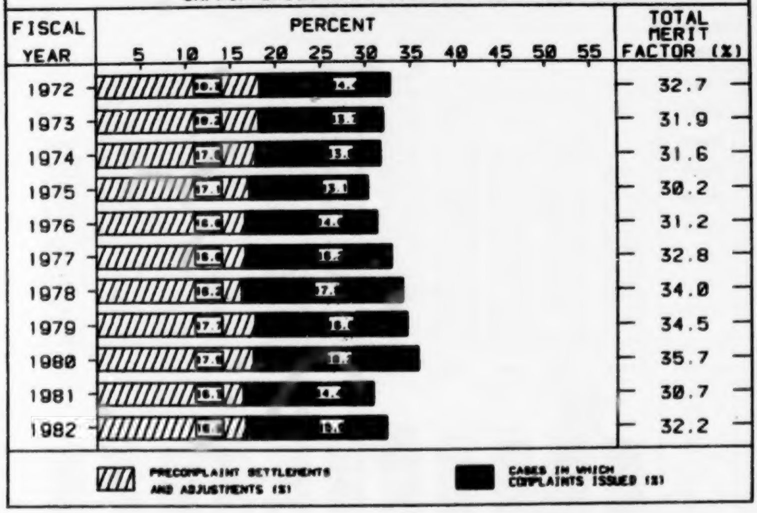


schedules hearings before administrative law judges. During 1982, 4,126 complaints were issued, compared with 5,711 in the preceding fiscal year. (Chart 6.)

Of complaints issued, 86.2 percent were against employers, 13.7 percent against unions, and 0.1 percent against both employers and unions.

NLRB regional offices processed cases from filing of charges to issuance of complaints in a median of 48 days, compared with 44 days in 1981. The 48 days included 15 days in which parties had the opportunity to adjust charges and remedy violations without resort to formal NLRB processes. (Chart 6.)

CHART NO. 5
UNFAIR LABOR PRACTICE MERIT FACTOR



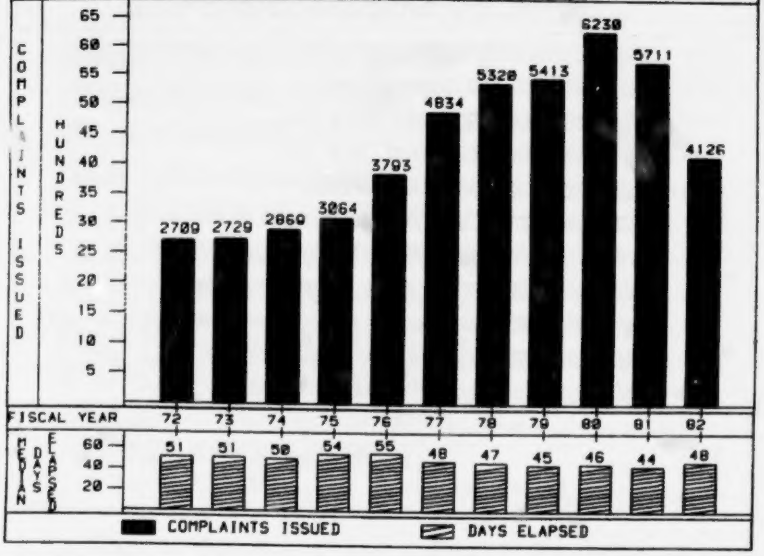
Additional settlements occur before, during, and after hearings before administrative law judges. Even so, their hearing and decisional workload is heavy. The judges issued 1,122 decisions in 1,557 cases during 1982. They conducted 1,095 initial hearings, and 44 additional hearings in supplemental matters. (Chart 8 and Table 3A.)

By filing exceptions to judges' findings and recommended rulings, parties may bring unfair labor practice cases to the five-member Board for final NLRB decision.

In fiscal 1982, the Board issued 1,108 decisions in unfair labor practice cases contested as to the law or the facts—1,018 initial decisions, 37 backpay decisions, 48 determinations in jurisdictional work dispute cases, and 5 decisions on supplemental matters. Of the 1,018 initial decision cases, 887 involved charges filed against employers, 119 had union respondents, and 12 contained charge against both employers and unions.

For the year, the NLRB awarded backpay amounting to $29. million. (Chart 9.) Reimbursement for unlawfully exacted fees dues, and fines added another $0.5 million. Backpay is lost wage caused by unlawful discharge and other discriminatory action detrimental to employees, offset by earnings elsewhere after the discrimination. Some 6,332 employees were offered reinstatement, anc 59 percent accepted.

CHART NO. 6
COMPLAINTS ISSUED IN UNFAIR LABOR PRACTICE PROCEEDINGS
AND MEDIAN DAYS FROM FILING TO COMPLAINT



At the end of fiscal 1982, there were 23,525 unfair labor practice cases being processed at all stages by the NLRB, compared with 21,852 cases pending at the beginning of the year.

2. Representation Cases

The NLRB received 9,113 representation and related case petitions in fiscal 1982. This compared with 12,576 such petitions a year earlier.

The 1982 total consisted of 6,312 petitions that the NLRB conduct secret-ballot elections where workers select or reject unions to represent them in collective bargaining; 1,964 petitions to decertify existing bargaining agents; 305 deauthorization petitions for referendums on rescinding a union's authority to enter into union-shop contracts; and 483 petitions for unit clarification to determine whether certain classifications of employees should be included in or excluded from existing bargaining units. Additionally, 49 amendment of certification petitions were filed.

During the year, 8,679 representation and related cases were closed, compared with 11,784 in fiscal 1981. Cases closed included 6,310 collective-bargaining election petitions; 1,651 decertification election petitions; 259 requests for deauthorization polls; and 468

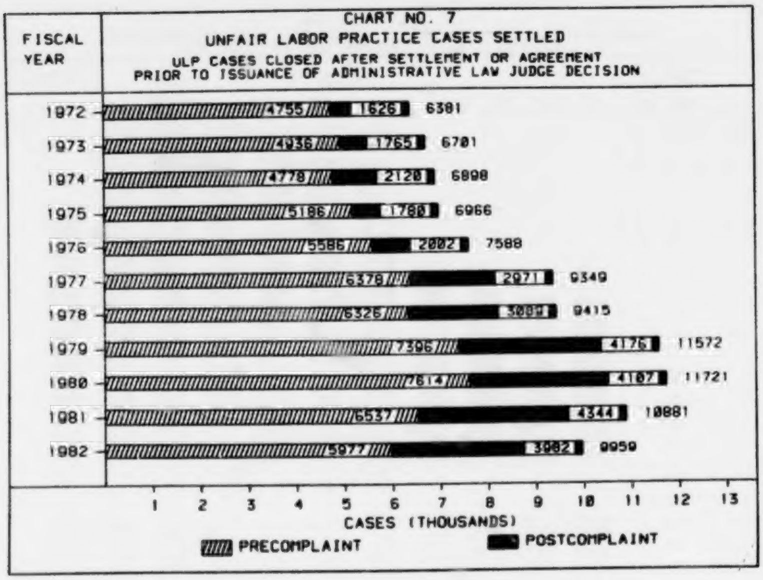


CHART NO. 7
UNFAIR LABOR PRACTICE CASES SETTLED
ULP CASES CLOSED AFTER SETTLEMENT OR AGREEMENT PRIOR TO ISSUANCE OF ADMINISTRATIVE LAW JUDGE DECISION

petitions for unit clarification and amendment of certification. (Chart 14 and Tables 1 and 1B.)

The overwhelming majority of elections conducted by the NLRB resulted from some form of agreement by the parties on when, where, and among whom the voting should occur. Such agreements are encouraged by the Agency. In 14.8 percent of representation cases closed by elections, balloting was ordered by NLRB regional directors following hearings on points in issue. In 9 cases, elections were directed by the Board after appeals or transfers of cases from regional offices. (Table 10.) There were 8 cases which resulted in expedited elections pursuant to the Act's 8(b)(7)(C) provisions pertaining to picketing.

3. Elections

The NLRB conducted 5,116 conclusive representation elections in cases closed in fiscal 1982, compared with the 7,512 such elections a year earlier. Of 297,764 employees eligible to vote, 257,599 cast ballots, virtually 9 of every 10 eligible.

Unions won 2,064 representation elections, or 40.3 percent. In winning majority designation, labor organizations earned bargaining rights or continued as employee representatives for 103,534 workers. The employee vote over the course of the year was 119,387 for union representation and 138,212 against.

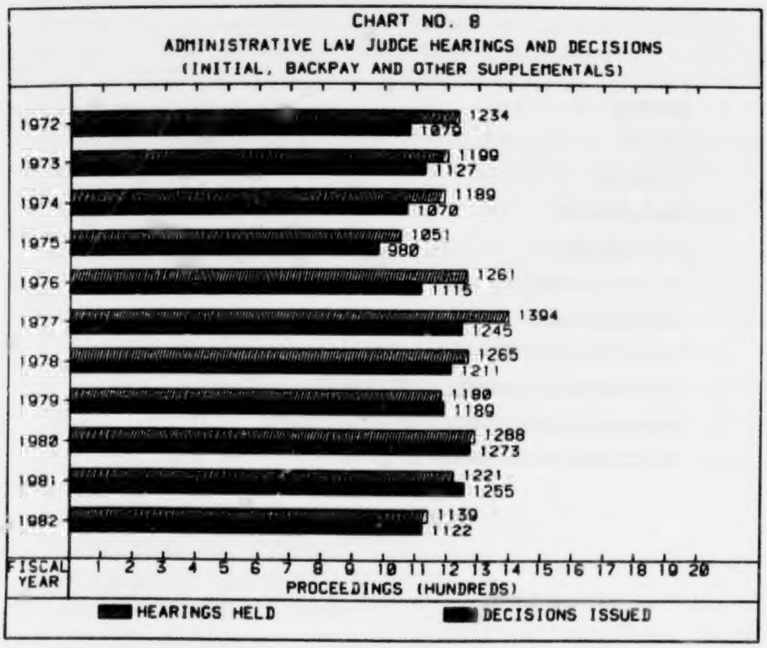


CHART NO. 8
ADMINISTRATIVE LAW JUDGE HEARINGS AND DECISIONS
(INITIAL, BACKPAY AND OTHER SUPPLEMENTALS)

The representation elections were in two categories—the 4,247 collective-bargaining elections in which workers chose or voted down labor organizations as their bargaining agents, plus the 869 decertification elections determining whether incumbent unions would continue to represent employees.

There were 4,862 select-or-reject-bargaining-rights (one union on ballot) elections, of which unions won 1,876, or 38.6 percent. In these elections, 96,486 workers voted to have unions as their agents, while 131,754 employees voted for no representation. In appropriate bargaining units of employees, the election results provided union agents for 77,949 workers. In NLRB elections, the majority decides the representational status for the entire unit.

There were 254 multiunion elections, in which two or more labor organizations were on the ballot, as well as a choice for no representation. Employees voted to continue or to commence representation by one of the unions in 188 elections, or 74.0 percent.

As in previous years, labor organizations lost decertification elections by a substantial percentage. The decertification results brought continued representation by unions in 207 elections, or 24 percent, covering 17,095 employees. Unions lost representation rights for 22,043 employees in 662 elections, or 76 percent. Unions

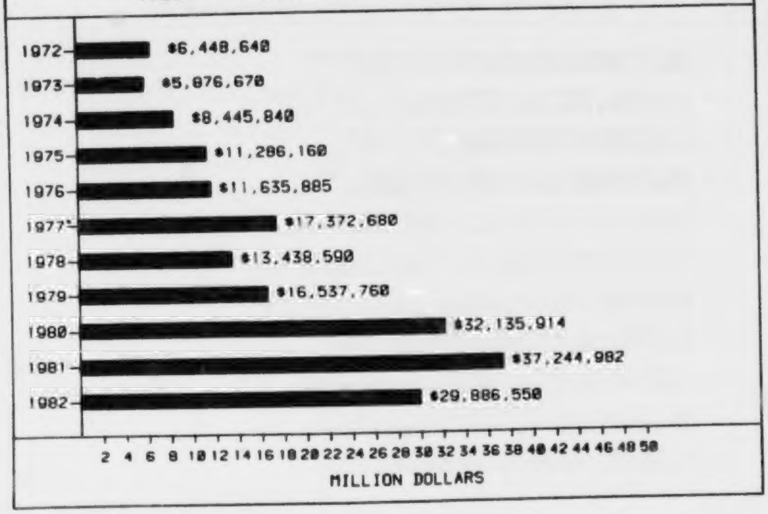


CHART NO. 9

AMOUNT OF BACKPAY RECEIVED BY DISCRIMINATEES

won in bargaining units averaging 83 employees, and lost in units averaging 33 employees. (Table 13.)

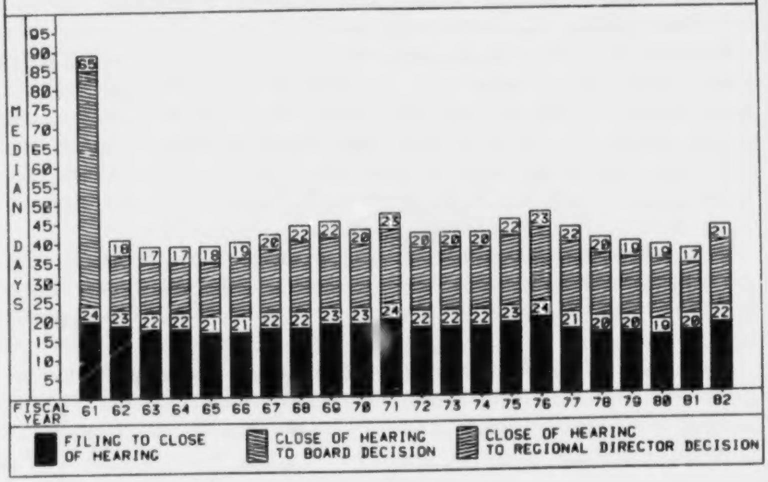


CHART NO. 10

TIME REQUIRED TO PROCESS REPRESENTATION CASES FROM FILING OF PETITION TO ISSUANCE OF DECISION

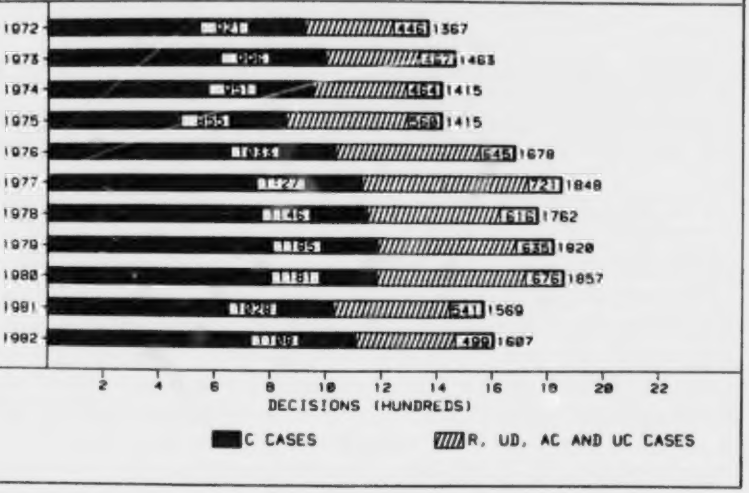
Besides the conclusive elections, there were 152 inconclusive representation elections during fiscal 1982 which resulted in withdrawal or dismissal of petitions before certification, or required a rerun or runoff election.

In deauthorization polls, labor organizations lost the right to make union-shop agreements in 55 referendums, or 62 percent, while they maintained the right in the other 34 polls which covered 1,817 employees. (Table 12.)

For all types of elections in 1982, the average number of employees voting, per establishment, was 50 compared with 52 in 1981. About three-quarters of the collective-bargaining and decertification elections involved 59 or fewer employees. (Tables 11 and 17.)

CHART NO. 11

CONTESTED BOARD DECISIONS ISSUED



4. Decisions Issued

a. Five-Member Board

Dealing effectively with the remaining cases reaching it from nationwide filings after dismissals, settlements, and adjustments in earlier processing stages, the Board handed down 2,394 decisions concerning allegations of unfair labor practices and questions relating to employee representation. This total compared with the 2,606 decisions rendered during fiscal 1981.

A breakdown of Board decisions follows:

Total Board decisions			2,394
Contested decisions			1,607
Unfair labor practice decisions		1,108	
Initial (includes those based on stipulated record)	1,018		
Supplemental	5		
Backpay	37		
Determinations in jurisdictional disputes	48		
Representation decisions		497	
After transfer by regional directors for initial decision	27		
After review of regional director decisions	70		
On objections and/or challenges	400		
Other decisions		2	
Clarification of bargaining unit	2		
Amendment to certification	0		
Union-deauthorization	0		
Noncontested decisions			787
Unfair labor practice	523		
Representation	261		
Other	3		

Thus, it is apparent that the great majority (67 percent) of Board decisions resulted from cases contested by the parties as to the facts and/or application of the law. (Tables 3A, 3B, and 3C.)

Emphasizing the steadily mounting unfair labor practice caseload facing the Board was the fact that in fiscal 1982 more than 6 percent of all meritorious charges and 37 percent of all cases in which a hearing was conducted reached the five-member Board for decision. (Charts 3A and 3B.) These high proportions are even more significant considering that unfair labor practice cases in general require about 2½ times more processing effort than do representation cases.

b. Regional Directors

Meeting the challenge of a heavy workload, the NLRB regional directors issued 1,607 decisions in fiscal 1982, compared with 2,295 in 1981. (Chart 13 and Tables 3B and 3C.)

c. Administrative Law Judges

Despite the decrease in case filings alleging commission of unfair labor practices, the administrative law judges issued 1,122 decisions and conducted 1,139 hearings. (Chart 8 and Table 3A.)

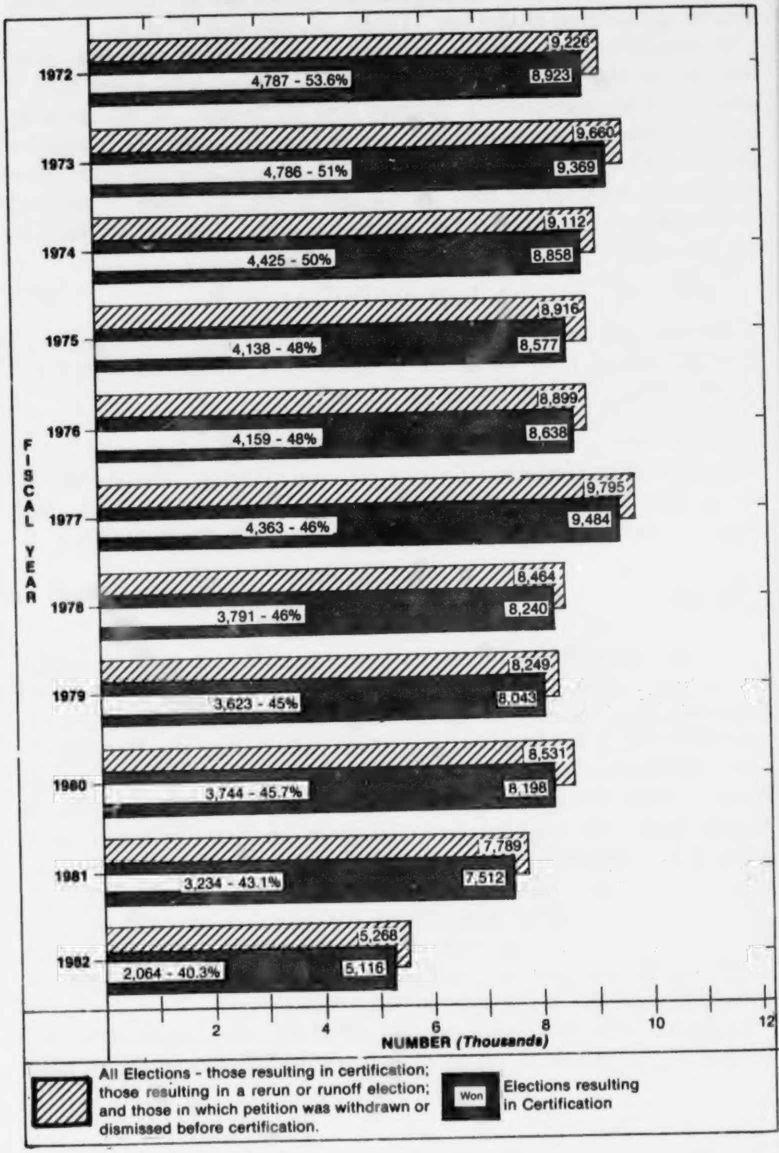
5. Court Litigation

a. Appellate Court Activity

The National Labor Relations Board is involved in more litigation in the United States courts of appeals than any other Federal administrative agency. In fiscal 1982, the Appellate Court Branch was responsible for handling 315 cases referred by the Regions for court enforcement and 160 cases wherein petitions for review were filed by other parties for a total intake of 475 cases. By filing briefs in 348 cases and securing compliance in another 136 cases for a total of 484, dispositions exceeded the intake. Oral arguments were presented in 331 cases compared with 485 in fiscal 1981. The median time for filing applications for enforcement was 44 days, compared to 53 days last year. The median time for both enforcement and review from the receipt of cases to the filing of briefs was 145 days, down from 149 days in fiscal 1981.

In fiscal 1982, 424 cases involving NLRB were decided by the United States courts of appeals compared with 479 in fiscal 1981.

CHART NO. 12
REPRESENTATION ELECTIONS CONDUCTED
(Based on Cases Closed During the Year)



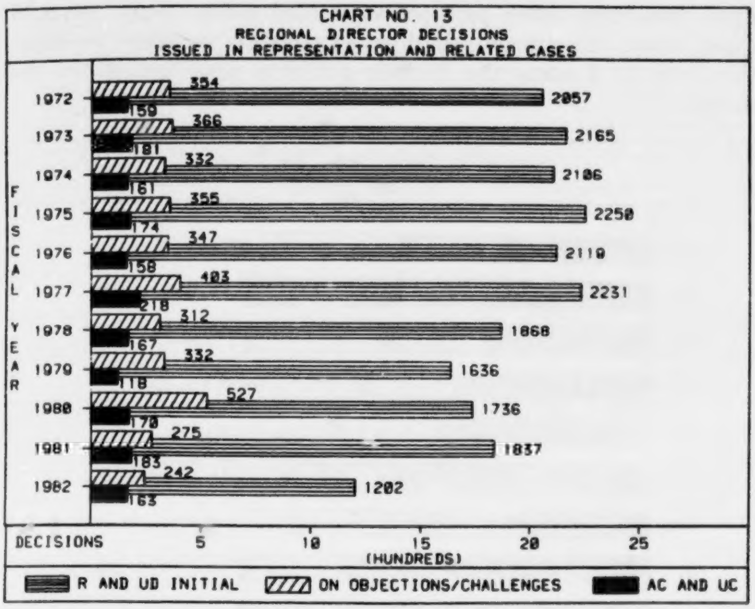


CHART NO. 13
REGIONAL DIRECTOR DECISIONS
ISSUED IN REPRESENTATION AND RELATED CASES

Of these 79.7 percent were won by NLRB in whole or in part compared to 80.2 percent in fiscal 1981; 7.8 percent were remanded entirely compared with 6.1 percent in fiscal 1981; and 12.5 percent were entire losses compared to 13.8 percent in fiscal 1981.

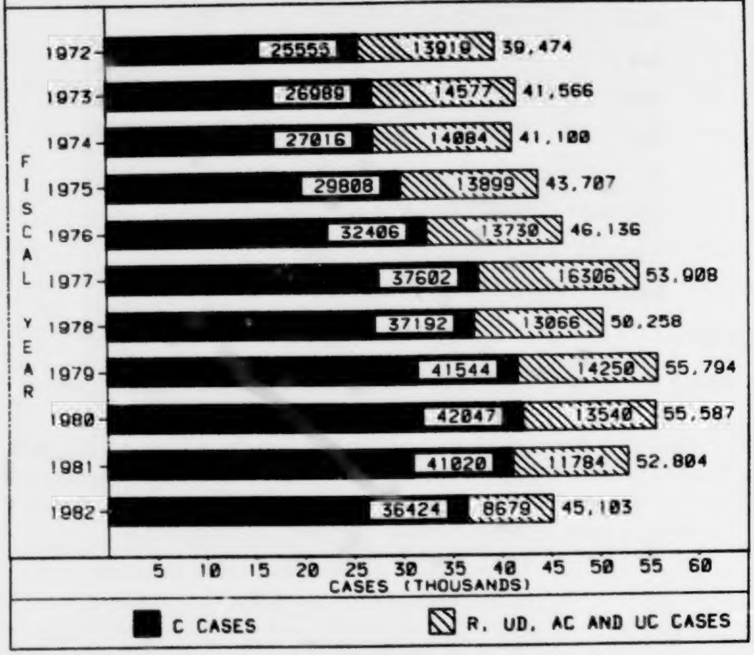
b. Supreme Court Activity

In fiscal 1982, the Supreme Court decided three Board cases and the Board won all three. In addition, in fiscal 1982, the Board participated as amicus in two cases. In fiscal 1982, the Court denied 52 private party petitions for certiorari compared to 72 private party petitions denied in fiscal 1981. Finally, in fiscal 1982, the Court granted one Board petition for certiorari and three private party petitions.

c. Contempt Activity

In fiscal 1982, 108 cases were referred to the comtempt section for consideration of contempt action. During fiscal 1982, 29 contempt proceedings were instituted. There were 19 contempt adjudications awarded in favor of the Board; 5 cases were discontinued upon compliance after petitions were filed before court orders; 6 cases where compliance was directed without contempt adjudication; and in 2 cases the Board's petitions were denied on the merits.

CHART NO. 14
CASES CLOSED



d. Miscellaneous Litigation Activity

The miscellaneous litigation section closed 74 cases in this fiscal year. In addition, it filed 110 briefs in district court and 50 in appelate court.

e. Injunction Activity

The NLRB sought injunctions pursuant to section 10(j) and 10(l) in 143 petitions filed with the U.S. district courts, compared with 182 in fiscal 1981. (Table 20.) Injunctions were granted in 88, or 86 percent, of the 102 cases litigated to final order.

NLRB injunction activity in district courts in 1982:

Granted	88
Denied	14
Withdrawn	5
Dismissed	7
Settled or placed on courts' inactive lists	55
Awaiting action at end of fiscal year	0

C. Decisional Highlights

In the course of the Board's administration of the Act during the report period, it was required to consider and resolve complex problems arising from the great variety of factual patterns in the many cases reaching it. In some cases, new developments in industrial relations, as presented by the factual situation, required the Board's accommodation of established principles to those developments. Chapter II, "Jurisdiction of the Board," Chapter III, "Effect of Concurrent Arbitration Proceedings," Chapter IV, "Board Procedure," Chapter V, "Representation Proceedings," and Chapter VI, "Unfair Labor Practices" discuss some of the more significant decisions of the Board during the report period. The following summarizes briefly several of the decisions establishing or reexamining basic principles in significant areas.

1. Campaign Misrepresentation as Objectionable Conduct

The appropriate standard for Board evaluation of the circumstances under which election campaign misrepresentations may constitute objectionable conduct warranting setting aside an election has received recurrent consideration by the Board.

In its *Midland National Life Insurance* [1] case, the Board reviewed the history of its treatment of election misrepresentation and announced its return to the policy established in *Shopping Kart* [2] under which the Board would not consider the truth or falsity of election propaganda except where the campaign practice improperly involved the Board and its processes, or the use of forged documents to conceal the nature of the propaganda. In doing so, the Board recognized that, although reasonable men could and have differed over the most appropriate standard to use in evaluating campaign propaganda, the policy announced was that best adapted to assure a "fair and free choice" by the voters. Under this standard an election will not be set aside because of the substance

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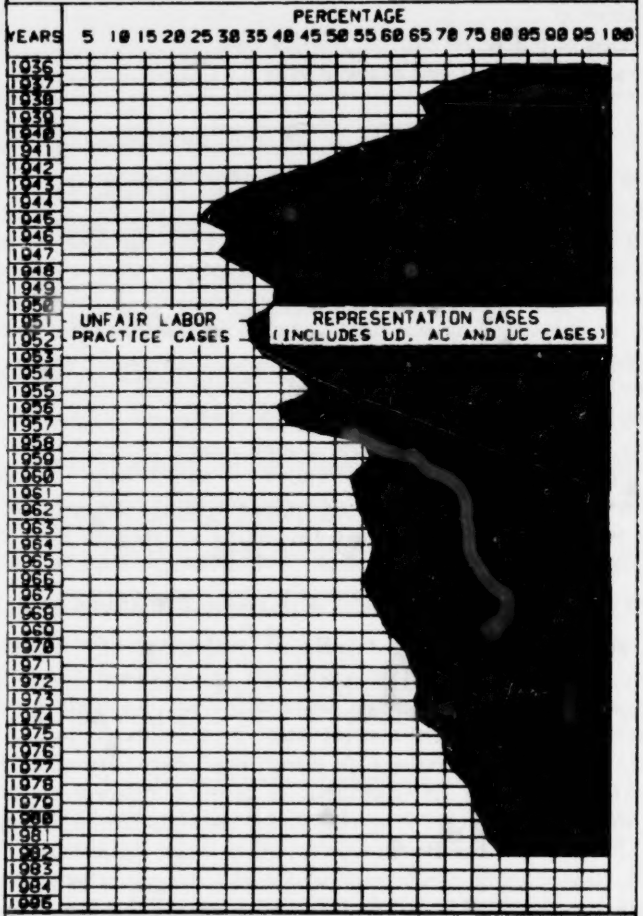
[1] 263 NLRB 127, infra, pp. 89, 91–92.
[2] 228 NLRB 1311 (1977).

CHART NO 15

COMPARISON OF FILINGS OF UNFAIR LABOR PRACTICE CASES AND REPRESENTATION CASES



THIS GRAPH SHOWS THE PERCENTAGE DIVISION OF NLRB CASELOAD BETWEEN UNFAIR LABOR PRACTICE CASES AND REPRESENTATION CASES DURING FISCAL YEARS 1936-1982.

of the representation, but because of the deceptive manner in which it is made.

2. Employer Neutrality in Rival Union Organizing Situations

During the report year the Board reevaluated its *Midwest Piping*[3] doctrine which sought to insure that in rival union organizing situations the employer would not "aid" one of two or more unions competing for exclusive representative status through a grant of recognition in advance of a Board-conducted election. In *Bruckner Nursing Home*[4] the Board held that in an initial organization situation involving two or more rival labor organizations the reconcilation of the various interests involved would be best accommodated by providing that an employer could properly recognize a labor organization which would represent an uncoerced, unassisted majority before a valid petition for an election had been filed with the Board, but that once a properly supported petition for a Board election had been filed, the employer must refrain from recognizing any of the rival unions.

In a companion case, *RCA Del Caribe, Inc.*,[5] the Board addressed the policy with respect to the requirement of employer neutrality when an incumbent representative is challenged by an "outside" union. It concluded that, unlike the initial recognition situation, an employer to an existing collective-bargaining relationship cannot observe strict neutrality consistent with the Act's concern for stability in collective-bargaining relations, as embodied in the presumption of continuing majority status accorded a recognized majority representative. The Board therefore held that the mere filing of a representation petition by an outside, challenging union would no longer require or permit an employer to withdraw from bargaining or executing a contract with the incumbent union. It made clear that the new rule would not have the effect of insulating unions from a legitimate outside challenge by noting that a valid timely petition filed by an outside union would be promptly processed. Although the employees would no longer be deprived of full representation by the incumbent union during that period because of resort to the Board's election process by a rival union, where the challenging union prevails in the election, any contract executed by the employer with the incumbent union would be null and void.

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[3] *Midwest Piping & Supply Co.*, 63 NLRB 1060 (1945).
[4] 262 NLRB 995, infra, pp. 129, 131-132.
[5] 262 NLRB 963, infra, pp. 131, 133-134.

3. Employee Representation at Investigatory Interview

The scope of employees' section 7 rights was further defined by the Board in *Materials Research Corp.*[6] where the Board held that an employee's right to the assistance of a representative at an investigatory interview conducted by the employer extended to employees not represented by a union, as well as to those so represented. The Board noted that, although the decision of the Supreme Court in *Weingarten*[7] was framed in terms of an employee's right to the assistance of a union representative—the specific fact pattern of the cases—the decision based the right to representation on the section 7 protection afforded to concerted activity for mutual aid and protection, and not on the union right as representative under section 9. Since the protection afforded by section 7 does not vary depending on whether or not the employee involved is represented by a union, but only on whether the conduct involved is related directly or indirectly to concerted activity, the protection afforded by section 7 to entitlement to a representative at the interview is appropriately extended to unorganized employees also.

D. Financial Statement

The obligations and expenditures of the National Labor Relations Board for the fiscal year ended September 30, 1982, are as follows:

Personnel compensation	$83,105,085
Personnel benefits	8,193,802
Travel and transportation of persons	3,267,766
Transportation of things	74,066
Rent, communications, and utilities	16,387,840
Printing and reproduction	860,389
Other services	3,263,839
Supplies and materials	1,507,072
Equipment	824,974
Insurance claims and indemnities	65,673
Total obligations and expenditures	[8]$117,550,506

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[6] 262 NLRB 1010.

[7] *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

[8] Includes reimbursable obligations as follows: Personnel compensation, $5,000.

II

Jurisdiction of the Board

The Board's jurisdiction under the Act, as to both representation proceedings and unfair labor practices, extends to all enterprises whose operations "affect" interstate or foreign commerce.[1] However, Congress and the courts [2] have recognized the Board's discretion to limit the exercise of its broad statutory jurisdiction to enterprises whose effect on commerce is, in the Board's opinion, substantial—such discretion being subject only to the statutory limitation [3] that jurisdiction may not be declined where it would have been asserted under the Board's self-imposed jurisdictional standards prevailing on August 1, 1959.[4] Accordingly, before the Board takes cognizance of a case, it must first be established that it has legal or statutory jurisdiction; i.e., that the business operations involved "affect" commerce within the meaning of the Act. It must also appear that the business operations meet the Board's applicable jurisdictional standards.[5]

A. Entities Related to an Exempt Entity

In a series of cases, the Board applied its recent decision in *Natl. Transportation Service*,[6] in which the Board, in dealing with the question of whether jurisdiction should be asserted over the private provider of daily schoolbus transportation and related charter services to a public school system, abandoned the "intimate connection" test for ascertaining whether the Board should assert jurisdiction over an employer with close ties to an exempt State governmental entity. Instead, the Board adopted the "right to control" test, whereby, after it first determines that the employer meets the definition of "employer" in section 2(2) of Act, it then determines whether the employer has sufficient control over its employees' terms and conditions of employment to enable it to bargain effectively with the employees' representative.

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[1] See secs. 9(c) and 10(a) of the Act and also definition of "commerce" and "affecting commerce" set forth in sec. 2(6) and (7), respectively. Under sec. 2(2) the term "employer" does not include the United States or any wholly owned Government corporation, any Federal Reserve Bank, any State or political subdivision, any person subject to the Railway Labor Act, or any labor organization other than when acting as an employer. The exclusion of nonprofit hospitals from the definition of employer was deleted by the health care amendments to the Act (Public Law 93-360, 88 Stat. 395, effective August 25, 1974). Nonprofit hospitals, as well as convalescent hospitals, health maintenance organizations, health clinics, nursing homes, extended care facilities, and other institutions "devoted to the care of sick, infirm, or aged person" are now included in the definition of "health care institutions" under the new sec. 2(14) of the Act. "Agricultural laborers" and others excluded from the term "employee" as defined by sec. 2(3) of the Act are discussed, *inter alia*, at 29 NLRB Ann. Rep. 52–55 (1964), and 31 NLRB Ann. Rep. 36 (1966).

[2] See 25 NLRB Ann. Rep. 18 (1960).

[3] See sec. 14(c)(1) of the Act.

[4] These self-imposed standards are primarily expressed in terms of the gross dollar volume of business in question: 23 NLRB Ann. Rep. 18 (1958). See also *Floridan Hotel of Tampa*, 124 NLRB 261 (1959), for hotel and motel standards.

[5] While a mere showing that the Board's gross dollar volume standards are met is ordinarily insufficient to establish legal or statutory jurisdiction, no further proof of legal or statutory jurisdiction is necessary where it is shown that the Board's "outflow-inflow" standards are met. 25 NLRB Ann. Rep. 19–20 (1960). But see *Sioux Valley Empire Electric Assn.*, 122 NLRB 92 (1958), as to the treatment of local public utilities.

[6] 240 NLRB 565 (1979).

In *Wordsworth Academy,*[7] the Board resolved the issue of whether, consistent with the rules set forth in *Natl. Transportation Service, supra,* an employer was exempt from the Board's jurisdiction because it acted as an adjunct to public schools. In this case, the employer, a private nonprofit school, provided special education services to children who suffered from learning disabilities. The school claimed that its participation in a state education plan for such children established its exemption. Under this plan, the state school districts were required to identify exceptional children, diagnose their learning disabilities, and provide for an appropriate education, either themselves or through approved private schools, such as the employer, at state expense. Here, the employer had received state approval upon its application for approved status and by onsite evaluations of the employer's program. The State, however, had no role in hiring, firing, disciplining, or promoting staff or faculty, setting fringe benefits or salaries, or establishing leave or grievance policies, although it did enforce a statutory ceiling on reimburseable expenses to state-referred students. A Board majority found that the adjunct test, which examines the relationship between the employer and the exempt entity, was no longer a viable jurisdiction test, and that it was nothing more than the intimate connection test reborn. The majority further found no reason to apply the adjunct test only to schools, and thereby treat schools differently from other employers who might have close ties to an exempt entity. Accordingly, for the reasons which persuaded the Board in *Natl. Transportation, supra,* to reject the "intimate connection" test, the majority rejected the adjunct test and applied the standard announced in *Natl. Transportation.* Noting the indirect effect of minimum state standards for teacher qualifications, the majority found no evidence that the State plays any role in the employer's hiring, firing, disciplining, or promoting of staff or faculty, or in resolving grievances or setting working conditions. The Board majority asserted jurisdiction over the employer because the employer retained sufficient control over employment conditions to enable it to bargain effectively with a union.

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[7] 262 NLRB 438 (Members Fanning, Jenkins, and Zimmerman; Chairman Van de Water and Member Hunter dissenting).

Chairman Van de Water and Member Hunter, dissenting, would have declined to assert jurisdiction over the employer, finding that the "intimate connection" test abandoned by the Board majority in *Natl. Transportation* was the appropriate test and that the employer who participated in the State's program for exceptional children met this test by acting as an arm of the State in fulfilling the State's statutory duty to provide all its citizens with the opportunity for an education.

In *Youth Guidance Center,*[8] the Board was presented with the question of whether jurisdiction should be asserted over an employer which operated a mental health clinic and which had executed a partnership agreement with an exempt state mental health agency, under which the state agency itself employed the direct services of professionals, including certain supervisory and managerial personnel. The employer, a private corporation, provided outpatient community mental health services to private patients and also to other patients pursuant to service contracts with local municipalities and the state mental health agency. Neither the state agency nor the municipalities had any control over the hiring, firing, and other terms and conditions of the employer's employees, although the state agency retained control over the labor relations of its own employees loaned to the employer. As a result, the employer provided its employees' salaries, vacation days, retirement plans, health plan, holidays, and other benefits which differed significantly from those provided the state employees. Certain part-time state employees also worked additional hours as employees of the employer, and received different salaries and benefits for additional hours. Moreover, the partnership agreement specifically precluded the State from exercising control over the employment conditions of the employer's employees.

The Board majority asserted jurisdiction over the employer with respect to its own employees, finding that neither the State nor any of its subdivisions exercised any appreciable control over them. They found that the employer's personnel policies were adopted by its board of directors, that no state agency had any input or control over the formulation or exercise of these policies, and that the state employees who served in supervisory or managerial capacities merely applied the employer's policies to the employer's employees. The majority further found that the intermingling of private and state employees did not preclude the Board's assertion of jurisdiction, and that the employer could negotiate and execute a collective-bargaining agreement.

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[8] *Greater Framingham Mental Health Assn., d/b/a Youth Guidance Center,* 263 NLRB 1330 (Members Fanning, Jenkins, and Zimmerman; Chairman Van de Water dissenting).

Chairman Van de Water, dissenting, would have declined to assert jurisdiction under the "intimate connection" test, finding that the employer acted as an arm of the State in providing statutorily mandated mental health services.

In *American Totalisator Co.,*[9] the Board was faced with the issue of whether an employer engaged in the manufacture, service, and repair of equipment used in parimutuel wagering at racetracks was an integral part of the horseracing industry, over which the Board has declined to assert jurisdiction.[10] The employer had 400 field employees who maintained, serviced, and repaired such parimutuel equipment at racetracks throughout the United States, as well as about 45 employees who were similarly employed in the employer's shop and who also manufactured the equipment. These field and shop employees did not operate this equipment and they did not handle money that was wagered. They had minimum contact with racetrack personnel. The Board majority concluded that the employer was not an integral part of the horseracing industry and decided to assert jurisdiction over it. They noted that the Board previously had asserted jurisdiction over a "sister company" of the employer whose operations parallel those of the employer by providing similar equipment and services for off-track betting and lotteries and by using similar classifications of employees who perform similar work and that, in asserting jurisdiction, the Board generally has not been concerned with the type of operation conducted by an employee customer. They further stated that the mere fact that parimutuel equipment is designed for racetracks did not make the employer an integral part of the horseracing industry. The majority found that the employer operated as a separate independent entity and that it retained control over its field employees and was capable of effective bargaining for them. Accordingly, they decided to assert jurisdiction over the employer.[11]

In their dissent, Chairman Van de Water and Member Hunter stated that they would not assert jurisdiction over the employer because they found that its operations were an integral part of the horseracing industry, pointing our that the majority had abandoned longstanding policies and had departed from recent precedent and section 103.3 of the Board's Rules.

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[9] 264 NLRB 1100 (Members Fanning, Jenkins, and Zimmerman; Chairman Van de Water an Member Hunter dissenting).

[10] See sec. 103.3 of the Board's Rules and Regulations.

[11] Members Fanning and Zimmerman stated that they would assert jurisdiction over th employer even if it constituted a part of the horseracing industry.

In two cases, the Board considered whether employers which provided schoolbus transportation services to exempt school districts retained sufficient control over their labor relations to warrant the assertion of jurisdiction under the right-to-control test of *Natl. Transportation, supra.* In the first case, *Associated Charter Bus Co., San Bernardino Div.,*[12] the employer was engaged primarily in providing a school district with schoolbus transportation services. Under the contract with the employer, the school district had final authority over routes and schedules, had the right to specifically assign drivers to routes, and required that drivers be permanently assigned a particular route where possible, with the school district being notified of any changes. The contract also required semiannual skills tests conducted by a district representative and provided that the school district be notified of actual or potential labor disputes. Although the contract was silent on wages, benefits, and working conditions of the employees, the school district had considerable influence in these matters and, prior to the execution of the contract, it also required the employer to institute major medical and life insurance coverage for employees. The school district coauthored the employer's drivers' handbook which provided for discipline for drivers who disobeyed orders, rules, and regulations of the school district personnel and which stated that discipline be imposed after consultation with the school district. The panel noted that the district supplied the employer with additional supervisors, that the district employees, working at the employer's offices, played a dominant role in day-to-day operations and that, in many instances, the district's supervisor of transportation wielded supreme disciplinary authority over the employer's employees. Since the school district exercised extensive control over the wages, benefits, hiring, discipline, supervision, and work assignments of the employer's employees, the panel concluded that the record demonstrated that the exempt school district had substantial control over the employer's labor relations and was a joint employer of the employer's employees. Accordingly, it concluded that it was precluded from asserting jurisdiction.

In *Associated Charter Bus Co., Las Virgenes Div.,*[13] the same panel also refused to assert jurisdiction over another transportation company, a subsidiary of the employer which was similarly involved in providing schoolbus services to a school district. The agreement between that employer and the school district provided that the school district had final approval over routes and schedules, that all personnel hired were subject to initial and continuing approval by the district,[14] that drivers be assigned permanent routes where possible, and that the district have available reports on such information as late or missed trips, driver logs, and inspection, maintenance, and repair reports. The record also showed that a school district official interviewed all returning incumbent and prospective new drivers, that the employer granted a wage increase after district approval, and that the district directed that the employer institute a plan for sick leave. The school district's transportation coordinator played a dominant role in the employer's daily operations, meeting with drivers and employer representatives, *inter alia,* in response to complaints about drivers. The panel found that, under the right-to-control test of *Natl. Transportation, supra,* the school district had substantial control over the terms and conditions of employment of the drivers, and that the exempt school district and the employer were joint employers of the employer's employees so that the Board was precluded from asserting jurisdiction.

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[12] *Educational & Recreational Services, d/b/a Associated Charter Bus Co., San Bernardino Div.*, 261 NLRB 448 (Members Fanning, Jenkins, and Zimmerman).

[13] *Educational & Recreational Services, d/b/a Associated Charter Bus Co., Las Virgenes Div.*, 263 NLRB 972 (Members Fanning, Jenkins, and Zimmerman).

In *Target,*[15] a Board panel considered the *Natl. Transportation* right-of-control test as it applied to an employer providing residential mental health care and vocational day care for mentally retarded adults. Under its contracts with the Commonwealth of Massachusetts mental health department, through which it received 98 percent of its income, the employer provided these residential and day care services for clients referred to it by the department. The employer might accept as clients only those referred by the department and these clients could be removed only with department approval. The contracts were renegotiated annually with the state mental health department setting a dollar limit for salaries and fringe benefits. These contracts also required compliance with a Federal district court consent decree which delineated operating guidelines applicable for direct care providers, including specific job descriptions, staffing and training requirements, program review standards, staff client ratio, and staff salary schedules. The State Department was involved in setting standards for hiring the employer's employees, with preference being given to state employees. Finally, the department provided a procedure for investigating complaints regarding employee treatment of clients, and it was empowered to make staffing changes. Based on the evidence, and applying the test articulated in *Natl. Transportation,* the panel concluded that the employer could not engage in meaningful bargaining because the Commonwealth retained substantial control ove wages, benefits, and other working conditions of the employees and that the employer shared the Commonwealth's section 2(2) exemption from Board jurisdiction. Accordingly, it declined to assert jurisdiction.

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[14] The employer hired and supervised the mechanics without school district participation.

[15] 263 NLRB 781 (Members Fanning, Jenkins, and Zimmerman).

B. Other Entities

In *Jervis Public Library Assn.,*[16] the Board majority declined to assert jurisdiction over a public library incorporated in New York which lent books and other materials to the public. The employer received approximately 95 percent of its gross revenue from the state, county, and city governments, with its annual budgets requiring the approval of the state and city governments. The majority found that, as a result of this budget approval process, the state and city exercised significant control over the employer's expenditures. They also noted that the employer operated pursuant to regulations promulgated by the state commissioner of education and that employees participated in the state retirement system and in the city health insurance plan, with the employer making employee contributions. Considering the degree of governmental operating and budgeting control and the employer's longstanding history as a state-authorized educational facility, the majority concluded that the employer was an agent of the State because it acted as an "administrative arm" of the State in providing educational services to the public, citing *N.Y. Institute for the Education of the Blind.*[17]

In his dissent, Member Zimmerman contended that the majority's finding that the employer was an "administrative arm" of the State and therefore not within the Board's jurisdiction had no foundation in the record, contradicted the jurisdictional standards of *Natl. Transportation, supra,* and was a throwback to the so-called intimate connection and local-in-character jurisdictional tests, which were rejected in *Natl. Transportation.* He argued that the nature of the employer's services and the source of its finding were immaterial to the question of jurisdiction so long as an employer was capable of engaging in meaningful collective bargaining over terms and conditions of employment. He further contended that, unlike *N.Y. Institute, supra,* where the employer was established directly by the State, and since that time had been specifically designated by the State as the latter's agent in satisfying the State's constitutional obligation to provide public education, the instant employer was established pursuant to laws applicable to the incorporation of libraries in general, and had not been so specifically designated as an agent of the State. Member Zimmerman found that the employer had virtually full control over matters affecting wages, hours of employment, and working conditions, so that it was capable of engaging in meaningful collective bargaining over terms and conditions of employment with a union organization, and that, assuming compliance with whatever monetary jurisdictional standard the Board might set for public libraries, it would effectuate the purposes of the Act to assert jurisdiction over the employer.

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[16] 262 NLRB 1386 (Chairman Van de Water, and Members Fanning, Jenkins, and Hunter; Member Zimmerman dissenting).

[17] 254 NLRB 664 (1981).

In *Faith Center—WHCT Channel 18,*[18] the issue was whether the Board should assert jurisdiction over an "electronic church of the air." The Board majority decided not to assert jurisdiction over the employer, a nonprofit church corporation, which operated one radio station and three television stations for the purpose of religious and charitable programing. The majority found that the employer's broadcasting activities were essentially an electronic extension of its church where services were conducted before a live, in-person congregation. Such broadcasts provided religious instruction and fellowship to its viewer congregation, similar to that provided its live, in-person congregation. The majority found that the electronic media means by which the employer chose to advance its religious message as opposed to more conventional means, furnished no basis in fact or law for asserting jurisdiction, especially where the assertion of jurisdiction could well raise serious constitutional questions arising out of the religion clause in the first amendment. Accordingly, the majority decided that it would not depart from the Board's traditional policy of declining jurisdiction over the purely religious, noncommercial activities of noncommercial, nonprofit religious organizations. They rejected the contention that the employer's regulation by the FCC indicated acquiescence in governmental control of its labor relations. The majority concluded that the employer's purpose and function was indistinguishable from "conventional" churches, and that the utilization of a television station as its pulpit could not alter that conclusion, nor detract from the employer's status as a church. Accordingly, the majority decided to decline jurisdiction since well-settled Board precedent argued persuasively for finding the employer's broadcasting was "purely religious" activity carried on by a religious institution or, at the very least, constituted activity so ancillary to the employer's religious objectives as to warrant the Board's declination of jurisdiction.

Members Fanning and Jenkins, dissenting, disputed the majority's discretionary decision not to assert jurisdiction. They stated that the noncommercial nature of an enterprise was irrelevant to the jurisdictional issue, noting that the employer's income of over $3 million indicated an impact on commerce sufficient to meet the applicable jurisdictional standard for employers in broadcasting. They also stated that the content of the employer's programing had no direct bearing on the employees who are responsible for nonreligious electronic and mechanical operation of the equipment, who need not be members of the employer, and who function in the same capacity as employees of typical commercial radio and television stations. Finally, they argued that the religious aims or orientation of the employer was insufficient cause to decline the exercise of jurisdiction since the Board seeks to regulate only the secular aspect of employment relations and that it was irrelevant to the jurisdictional question that the focus of the religious organization's enterprise was the dissemination or practice of religious beliefs. Accordingly, Members Fanning and Jenkins concluded that the exercise of regulatory authority, despite its impact on conduct based on religious beliefs, was justified, in view of its purely secular purpose and the compelling state interest in the prevention of labor disputes affecting commerce.

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[18] 261 NLRB 106 (Chairman Van de Water and Members Zimmerman and Hunter; Members Fanning and Jenkins dissenting).

III

Effect of Concurrent Arbitration Proceedings

It is clear that the jurisdiction of the Board over unfair labor practices is exclusive under section 10(a) of the Act and is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." However, consistent with the congressional policy to encourage utilization of agreements to arbitrate grievance disputes,[1] the Board, in the exercise of its discretion, will under appropriate circumstances withhold its processes in deference to an arbitration procedure.

The Board has long held under the *Spielberg* doctrine [2] that, where an issue presented in an unfair labor practice proceeding has previously been decided in an arbitration proceeding, the Board will defer to the arbitration award if the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. Before the *Collyer* decision,[3] the Board had deferred in a number of cases [4] where arbitration procedures were available but had not been utilized, but had declined to do so in other such cases. [5]

In the *Collyer* decision, as reapplied in *Roy Robinson,*[6] the Board established standards for deferring to contract grievance procedures before arbitration has been had with respect to a dispute over contract terms which was also, arguably, a violation of section 8(a)(5) of the Act. In *GAT,*[7] the Board modified *Collyer* and overruled *National Radio,*[8] which had extended the *Collyer* rationale to cases involving claims that employees' section 7 rights had been abridged in violation of section 8(a)(3). During the report year, a number of cases have been decided which involve the *Collyer* and *Spielberg* doctrines.

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[1] E.g., *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 (1957); *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578–581 (1960).

[2] *Spielberg Mfg. Co.,* 112 NLRB 1080, 1082 (1955).

[3] *Collyer Insulated Wire,* 192 NLRB 837 (1971). See 36 NLRB Ann Rep. 33–37 (1972).

[4] E.g., *Jos. Schlitz Brewing Co.,* 175 NLRB 141 (1969). The case was dismissed, without retaining jurisdiction pending the outcome of arbitration, by a panel of three members; Members Brown and Zagoria did so because they would defer to arbitration; Member Jenkins would not defer but dismissed on the merits, 34 NLRB Ann. Rep. 35–36 (1969); *Flintkote Co.,* 149 NLRB 1561 (1964), 30 NLRB Ann. Rep. 43 (1965); *Montgomery Ward & Co.,* 137 NLRB 413, 423 (1962); *Consolidated Aircraft Corp.,* 47 NLRB 694, 705–707 (1943).

[5] E.g., cases discussed in 34 NLRB Ann. Rep. 34, 36 (1969); 32 NLRB Ann. Rep. 41 (1967); 30 NLRB Ann. Rep. 43 (1965).

[6] *Roy Robinson Chevrolet,* 228 NLRB 828 (1977).

[7] *General American Transportation Corp.,* 228 NLRB 808 (1977).

[8] *Natl. Radio Co.,* 198 NLRB 527 (1972).

A. Deferral to Arbitration Proceedings

In *Professional Porter*,[9] an administrative law judge deferred to an arbitration award, which found that an employee, who had written a letter, also signed by other employees, allegedly disparaging the employer, had been discharged for cause and not for protected activity. He found that the award was consonant with the policies of the Act, stating that arbitrator had considered the issue of whether the letter had reached the level of public disparagement necessary to have deprived the employee of the protections of the Act. A Board majority reversed, concluding that deferral was inappropriate under the established position in *Suburban Motor Freight*,[10] where the Board found deferral inappropriate in situations where the unfair labor practice issue had not been both presented to and considered by the arbitrator. In so doing, the Board majority noted that, notwithstanding the arbitrator's conclusion that the grievant had not been discharged for union activity or for any other activity protected by the Act, although he conceded that the instant unfair labor practice complaint was not before him for determination and notwithstanding the administrative law judge's conclusion that the award was consonant to the Act, neither the union attorney nor the grievant presented to the arbitrator evidence pertaining to an alleged unfair labor practice and the union attorney stated that the issue had not been litigated. The majority thus found that the unfair labor practice issue had not been presented or considered by the arbitrator and accordingly declined to defer to the award.

In his dissent, Chairman Van de Water, in agreement with the administrative law judge, stated that he would defer to the arbitrator's award because both the arbitration proceeding and award met the standards for deferral under *Spielberg*.[11] In so doing, he argued for a return to the broad policy for deferral, noting that deferral pursuant to *Spielberg* was a reasonable exercise of the Board's discretion to decline to decide the merits of a case in order to serve the fundamental aims of the Act and to further the national policy favoring the settlement of labor disputes through grievance arbitration. He also argued that the standards set forth in *Suburban Motor Freight, supra*, departed from sound deferral policy since they opened the way for relitigation of issues resolved by the arbitrator. In his view, such standards lacked clarity and were therefore administratively unsound, creating the problem of how thoroughly the statutory issue must be presented and how completely it must be considered by the arbitrator. Finally, he stated that, absent evidence to the contrary, the Board should be willing to assume that the arbitrator has considered all issues presented to him, including any unfair labor practice issues. Accordingly, he would find that the arbitration award herein met the *Spielberg* standards for deferral.

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[9] *Professional Porter & Window Cleaning Co., Div. of Propoco*, 263 NLRB 136 (Members Fanning Jenkins, and Zimmerman; Chairman Van de Water and Member Hunter dissenting).

[10] 247 NLRB 146 (1980).

[11] *Spielberg Mfg., Co.*, 112 NLRB 1080 (1955).

Member Hunter, dissenting, found the majority's interpretation of the *Raytheon* requirement,[12] as embodied in *Suburban Motor Freight,* inconsistent with the strong national policy favoring voluntary arbitration of disputes. In his view, the majority was refusing to defer unless the parties litigated the unfair labor practice issue at the arbitration in exactly the same manner it would have been litigated before the Board.

Relying on *Kans. City Star Co.* and *Atlantic Steel Co.,*[13] he would find that an arbitrator adequately had considered the unfair labor practice issue where, as here, (1) the contractual issue was factually parallel to the unfair labor practice issue; and (2) it appeared from the record that the arbitrator was presented with facts generally relevant to resolving the unfair labor practice issue. Member Hunter would not require the arbitrator to pass specifically on the unfair labor practice because arbitrators do not have the authority to decide unfair labor practices. Finally, on the question of whether the award was clearly repugnant to the Act, Member Hunter would adopt the administrative law judge's conclusion that the award was not clearly repugnant to the Act, since he would defer to the arbitration award unless it was "palpably wrong"; i.e., it flies "in the face of well-established and clear Board precedent."

In response to the Chairman, the majority argued that abandonment of the *Suburban Motor Freight* requirements that the statutory issue be both presented to and considered by the arbitrator would mean a return to a policy which forced employees to seek simultaneous vindication of private contractual rights and public statutory rights or risk waiving the latter. They further stated that the election to proceed in a contractually created forum provided no basis for depriving an alleged discriminatee of a statutorily created forum for adjudication of unfair labor practices and that compelling such a grievant to forfeit the right to a Board disposition where, as here, the underlying unfair labor practice issue of employer motivation had not been addressed would make a "mockery" of the critical *Spielberg* requirement that the award not be clearly repugnant to the Act, if it was to be deferred. Further, the majority pointed out that by requiring, rather than permitting, simultaneous litigation of all issues before private tribunals neither charged nor experienced in the interpretation of the Act might discourage parties from resorting to contractual grievance and arbitration proceedings and would run in the face of the Board's statutory mandate to promote private resolution of collective-bargaining disputes. Finally, noting their finding that the unfair labor practice issue was not even presented in this case, the majority declined to engage in any unsupported speculation concerning the substance of the arbitration proceeding. In so doing, they stated that such speculation was contrary to the Board's statutory obligation to protect specified rights of parties which justified requiring the party seeking deferral to prove that the statutory issue had been litigated.

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[12] *Raytheon Co.,* 140 NLRB 883 (1963), where deferral was inappropriate because the arbitrator had not considered evidence relevant to the unfair labor practice.

[13] *Kans. City Star Co.,* 236 NLRB 866 (1978), the Board found deferral appropriate because the arbitrator made necessary factual findings and implicitly resolved the unfair labor practice issue. Similarly, in *Atlantic Steel Co.,* 245 NLRB 814 (1979), deferral was found appropriate since the arbitrator made complete factual findings which were parallel to the unfair labor practice.

In response to the two-part test set forth in Member Hunter's dissent, the majority argues that mere consideration of relevant facts did not necessarily lead to consideration of statutory issues where, as here, the contractual question of whether the grievant was discharged for just cause presented a legal issue different from the one presented by the statutory issue of protected activity or unprotected employer disparagement. In view of the "contract" issue as defined by the arbitrator, his recognition that a Board complaint alleging an unfair labor practice was not before him, and the undisputed fact that the grievant made no statutory arguments at the hearing, the majority disagreed with Member Hunter that the unfair labor practice had been presented to and considered by the arbitrator.

In *Consolidation Coal Co.*,[14] the employer's 70 employees engaged in an unauthorized work stoppage in violation of a no-strike clause and the employer discharged the union president and two union committeemen, but no other rank-and-file employees. The arbitrator upheld the discharge of the union president who instigated and led the strike. In reducing the discharge of the two union committeemen to 30-day suspensions, the arbitrator found that they had not instigated the wildcat strike, but that they, as officers of the union, had a greater responsibility for observance of the no-strike clause than did the rank-and-file members and their action served to establish an abrogation of their responsibility as union officers. The administrative law judge refused to defer to the arbitration award upholding the disparate treatment of the two union committeemen based on their status as union officers because it was repugnant to the purposes and policies of the Act as interpreted in *Precision Castings,*[15] and thus failed to qualify for deferral under *Spielberg.* The Board majority agreed with the administrative law judge and affirmed his refusal to defer.[16]

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[14] 263 NLRB 1306 (Members Fanning and Jenkins; Member Zimmerman concurring; Chairman Van de Water and Member Hunter dissenting).

Member Zimmerman, concurring, stated that if a collective-bargaining agreement contained an express provision which required union officers to take affirmative steps to prevent or curtail unauthorized work stoppages, he would find that more severe punishment imposed on union officers who did no more than participate in such an authorized work stoppage was not violative of the Act. But, absent any such express contractual obligations or evidence of instigation, he would not, contrary to the dissenters and the arbitrator to whom they would defer, premise a finding of validly imposed disparate treatment in this case on the notion that union officers had an *inherently* greater responsibility than rank-and-file employees to refrain from engaging in an unauthorized work stoppage. While Member Zimmerman agreed with the majority in rejecting the dissenters' positions in that regard, the majority disagreed with him on this point and found that disparate treatment of union officers *on the basis* of their union office was patently discriminatory under the Act, whether or not such disparate treatment was said to be meted out in consequence of an alleged breach of a contractual duty.

In his dissent, Chairman Van de Water stated that, in his judgment, *Spielberg* was applicable herein and that he would defer to the arbitrator's award because the arbitrator's decision which reduced the discharges of the union committeemen to 30-day suspensions for participation in an illegal work stoppage in face of a no-strike clause, was accomplished in accordance with the parties' collective-bargaining agreement. Further, if he were to reach the merits of the case, the Chairman stated that he would not find the discharges violative of the Act because the majority relied on *Precision Castings,* a decision which he considered distinguishable and, n any event, incorrect and because the majority's position herein undermined the grievance-arbitration policy and its companion no-strike commitment which are the keystone of our national policy of ensuring stable industrial relations.

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[15] In *Precision Castings Co.,* 233 NLRB 183 (1977), the employer had singled out for punishment union stewards who did no more than participate, along with other rank-and-file employes, in an unauthorized work stoppage, because of their status as shop stewards and because of heir failure to abide by their responsibility as union officials. However, rejecting the employer's ontention that the shop stewards could be held to a greater degree of responsibility for participating in the strike, the Board found that the employer had unlawfully punished the shop stewards. Thereafter, in *Gould Corp.,* 237 NLRB 881 (1978), enforcement denied 612 F.2d 728 (3d Cir. 979), decided in direct reliance on *Precision Castings, supra,* the Board further found that the isparate treatment of a union steward who did no more than to participate with other employes in an unauthorized strike was a clear violation of the Act because the steward had been isciplined "not because of his actions as an employee but for his lack of actions as a steward," hich the Board held to be a discriminatory and legally impermissible criterion for discipline.

[16] In addition, they noted that the unfair labor practice issue herein was neither presented to or considered by the arbitrator and that therefore deferral must be denied on those grounds lso in accord with *Professional Porter & Window Cleaning Co., Div. of Propoco, supra.*

Contrary to the majority, dissenting Member Hunter also found deferral to the arbitral award appropriate. In so doing, he observed that the arbitrator, in considering the employer's alleged unlawful discipline, found that the grievants, in their role as union officers, had greater responsponsibility than the rank-and-file to abide by the no-strike clause. He noted that the arbitrator further found that, in participating in the illegal walkout, they had abrogated this responsibility and concluded that this breach of duty "inherent in the collective-bargaining agreement" warranted harsher discipline. Member Hunter, referring to his dissent in *Propoco supra*, also found that the arbitrator had adequately considered the unfair labor practice issues since the contractual and statutory issues were factually parallel and the arbitrator was presented with the facts relevant to both the contract and the unfair labor practice questions.

Further, he would not view the arbitral award as clearly repugnant to the Act in light of the numerous, differing decisions from both the Board and the courts of appeals on the legality of the employer's disparate treatment of union officers for violating a no-strike clause.[17] Finally, Member Hunter stated that he would defer to the arbitrator's award in any event, because he agreed with the arbitrator that it was inherent in a no-strike clause that union officers have a higher duty than rank-and-file employees to abide by and enforce that clause, and, accordingly, employers can impose harsher discipline on those employees if the no-strike agreement is breached.

Considering the separate dissents of Chairman Van de Water and Member Hunter, the majority stated that the dissenters, in essence, would argue for deferral on the grounds that the award was not repugnant to the purposes and policies of the Act and would overrule the Board's decision in *Precision Castings*. With respect to Chairman Van de Water's dissent, the majority noted that he contented himself with a simple statement that, in his judgment, deferral was appropriate under *Spielberg*.

With respect to Member Hunter's dissent, the majority, contrary to his view that the arbitrator's decision rested on the breach of the grievant's duty inherent in the collective-bargaining agreement, found that the aribtrator's decision did not rest on the obligations inherent in the no-strike clause or in any other contractual clause, "but rather on the obligations which the arbitrator found to be inherent in the position of the union officer itself." They also disagreed with Member Hunter's conclusion that the arbitrator had considered both the contractual and the statutory issues in his decision, finding that the arbitrator had considered only the issue of whether a union officer had a greater responsibility to refrain from participating in an illegal work stoppage and did not consider the issue of whether the employer discharged the union committeemen because they engaged in protected concerted activities and whether it did so in order to discourage employees from joining or assisting the union or engaging in protected concerted activities. Finally, the majority expressly rejected Member Hunter's contention that the arbitral award was not clearly repugnant to the Act because of the allegedly inconsistent decisions prior to *Precision Castings, supra,* or because of the results reached by courts of appeals which have disagreed with the Board. In so doing, the majority noted that questions of deferral were properly resolved on the basis of legal standards determined by the Board and not on the basis of whether a reasonable argument could be made in favor of another standard.

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[17] Citing, *inter alia*, *Riviera Mfg. Co.*, 167 NLRB 772 (1967); *Gould supra; Metropolitan Edison Co.* v. *NLRB*, 663 F.2d 478 (3d Cir. 1981), enfg. 252 NLRB 1030 (1980); *C.H. Heist Corp.* v. *N.L.R.B.*, 657 F.2d 178 (7th Cir. 1981); *N.L.R.B.* v. *Armour-Dial*, 638 F.2d 51 (8th Cir. 1981); and *Fournelle* v. *N.L.R.B.*, 679 F.2d 331 (D.C. Cir. 1982).

In *American Freight System,*[18] a Board majority agreed with the administrative law judge that deferral was inappropriate in the face of a total lack of evidence that the statutory unfair labor practice had been resolved or even considered by the contractual joint grievance committee in rendering the arbitration award. In the underlying arbitration proceeding, which involved the discharge of an employee who refused to drive a truck because he reasonably believed that it was unsafe, the employee's grievance was denied by he joint committee with the statement that it "is the decision of he Committee to deny the claim," without setting forth findings of act, rationale, or any basis for its findings.

In adopting the administrative law judge's conclusion, the majorty noted that even when the contractual issue and the statutory ssue revolve around the same facts, it does not follow that the tandard of proof for the one is the same as that for the other. In he instant case, they stated that there were two distinct standards o be applied to resolve the contractual and statutory issues, one erived from the contract and one derived from section 7 of the Act. Thus to assume without the benefit of any evidence, as did the issenters, that the arbitrators fully considered the unfair labor ractice issue and applied the correct statutory standard, would nvite the Board to engage in a type of illogical and blind speculation about what happened during the arbitration hearing. The majority pointed out that they could presume that the arbitrators, in upholding the discharge, ruled that the truck was in fact not unsafe and that, if the arbitrators had so ruled, it could not be said that the statutory issue was resolved by them because, in order to be protected by section 7, the grievant's belief need not have been correct, but must only have been reasonable and held in good faith. Thus, the majority concluded that to assume that the arbitrators fully considered and applied the proper standards in resolving both issues "goes beyond deferral and approaches abdication."

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[18] 264 NLRB 126 (Members Fanning, Jenkins, and Zimmerman; Chairman Van de Water d Member Hunter dissenting).

Dissenting, Chairman Van de Water stated that for the reasons more fully set forth in his dissent in *Propoco,*[19] he would defer to the arbitration award as it fully met the standards for deferral under *Spielberg.*[20] In doing so, he found that the case record indicated that the issue of the employee's refusal to drive a truck he considered unsafe had been fully presented to and resolved by the joint committee. Further, he argued that absent evidence to the contrary, the Board should be willing to assume that the arbitrators had considered all issues presented to them, including the unfair labor practice issues, particularly where, as here, the resolution of the contractual issue necessarily resolved the unfair labor practice issue. In this respect, he found that the contractual issue and the statutory issue both involved whether the employee was justified in refusing to drive the truck and turned on factual considerations about the safety of the tires on the truck and the employee's contractual rights and obligations with respect thereto. Chairman Van de Water argued that to find that the committee did not consider the unfair labor practice issue would be to find that the committee might not have considered the very issue presented to it. Further, he contended that the committee's failure to offer an explanation was no reason to find that it had failed to consider the unfair labor practice issue presented to it.[21]

Dissenting Member Hunter would also defer to the award since it comported with the standard set forth in his dissent in *Propoco, supra.* He determined that the joint committee had adequately considered the unfair labor practice and that the award was not repugnant to the Act. Applying his *Propoco* standards, Member Hunter found that the first requirement was satisfied insofar as the contractual and statutory issues were factually parallel and as the committee was "presented generally with the facts relevant to the unfair labor practice." He further found the award not clearly repugnant to the Act as it was not "palpably wrong" since it did not fly in the face of well-established and clear Board doctrine, citing the Board's decision in *United Parcel, supra,* which "is virtually identical on its facts to the instant case."

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[19] *Professional Porter & Window Cleaning Co., Div. of Propoco,* 263 NLRB 136 (Members Fanning, Jenkins, and Zimmerman; Chairman Van de Water and Member Hunter dissenting).

[20] *Spielberg Mfg. Co.,* 112 NLRB 1080 (1955).

[21] The Chairman cited *United Parcel Service,* 232 NLRB 1114 (1977), enfd. *sub nom. Bloom* v. *N.L.R.B.,* 603 F.2d 1015 (D.C. Cir. 1979), in which the Board deferred to an arbitration award upholding the discharge of an employee who refused to drive equipment he considered unsafe, as clear precedent for deferral in this case, noting that the cases were distinguished only by the "non-critical" factor that the committee in *United Parcel Service, supra,* had stated that it had based its decision "on the facts" and that the committee in the instant case had not done so.

In *U.S. Steel Corp.,*[22] based on a stipulated record, the Board majority refused to defer to the award of an arbitrator who found that an employee's participation in a sympathy strike was not activity protected by the Act because it was barred by a broad contractual no-strike clause. In upholding the grievant's suspension, the arbitrator reasoned that, since the parties agreed that the question of whether the no-strike clause covered sympathy strikes was an arbitrable issue, it necessarily followed that sympathy strikes were encompassed within the contractual arbitration provision and covered by the contractual no-strike obligation. The arbitrator also distinguished *Gary-Hobart*[23] on the ground that the employer there had refused to arbitrate the dispute, while here "the parties have agreed that the dispute is arbitrable and they have thereby showed their understanding that whatever protection [the grievant's] conduct might otherwise have had under the National Labor Relations Act was waived . . . ."

In refusing to defer to the award, the Board majority rejected the arbitrator's circular reasoning that the willingness to arbitrate the issue of whether sympathy strikes were covered by the no-strike clause ineluctably led to the conclusion that the no-strike language was applicable to the sympathy strike in question. Rather than attempting to discern whether any evidence indicated a waiver, the majority noted that the arbitrator focused on the arbitrability of the scope of the no-strike provision. They found that the arbitrator did not apply the "clear and unmistakable waiver" test and that contrary to the Board's clear holding that no-strike language was not sufficient, *per se,* to establish a waiver, he relied solely on such language in finding a waiver. Accordingly, the majority thus concluded that, as the award was based on a standard which conflicted with Board law, it was clearly repugnant to the Act and was not a proper basis for deferral under *Spielberg.*

In their dissent, Chairman Van de Water and Member Hunter would find deferral appropriate, arguing that the majority had applied an improper deferral standard rather than the "clearly repugnant" standard of *Spielberg,* and citing their dissents in *Propoco, supra.* The dissent pointed out that, although the Board does not infer that a general no-strike clause waives the right of employees to honor third party picket lines, the question of waiver ultimately turns on contract interpretation.[24] In their view, the arbitrator's reliance on the broad language of the no-strike provision and a 35-year bargaining history provided at least a reasonable basis for finding that the right to refuse to cross a picket line had been waived and the fact that the majority would interpret the contract differently was not grounds under *Spielberg* for refusing to defer. Accordingly, since the *Spielberg* standards for deferral encompass deferral to an award which is subject to a permissible interpretation, the dissenters would not find the award in question repugnant to the Act and would defer to it.

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[22] 264 NLRB 76 (Members Fanning, Jenkins, and Zimmerman; Chairman Van de Water and Member Hunter dissenting).

[23] In *Gary-Hobart Water Corp.,* 210 NLRB 742 (1974), the Board, utilizing the coterminous application doctrine, found that a broad no-strike clause, similar to that involved herein, only covered matters which were arbitrable under the contract, and therefore did not ban sympathy strikes.

In response, the majority stated that their refusal to defer was not because they would interpret the contract differently from the arbitrator, but rather because it was evident from the arbitrator's reasoning that he applied the relevant legal precedent in a manner repugnant to the Act. The majority disagreed with the dissenter's willingness to defer to any arbitration award where the same result could or might be reached by the Board on some tenable ground even where the ground actually used was plainly repugnant to the Act. Accordingly, they argued that to ignore the means used in reaching an award would abdicate the Board's responsibility to uphold the rights accorded employees by the Act.

In *Inland Steel Co.,*[25] the Board majority agreed with the administrative law judge that deferral to an arbitrator's award, holding that the broad no-strike language of a collective-bargaining agreement constituted an effective waiver of an employee's right to engage in a sympathy strike, was inappropriate. In making the award, the arbitrator referred to the face of the no-strike provisions *and* to collateral evidence of the parties' conduct during their 35 years of coverage by those provisions. While noting that in going beyond the face of the no-strike provisions to find a sympathy strike waiver based on extrinsic evidence of bargaining history, the arbitrator had not engaged in a mode of analysis repugnant to the Act, the majority found that the arbitrator's reliance on the totality of bargaining history evidence was insufficient as a matter of law to find a waiver of a statutory right and they further found that because he failed to follow well-established Board precedent that past failure to assert a right did not bar subsequent assertion of that right, his interpretation of the parties' no-strike agreement was "palpably wrong."

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[24] Chairman Van de Water and Member Hunter, citing *Stevens Ready-Mix Concrete Corp.,* 263 NLRB 1280 (1982), stated that, in any event, they do not agree with the Board's position on waiver of the right of employees to sympathy strike by virtue of a general no-strike clause.

[25] 264 NLRB 84 (Members Fanning, Jenkins, and Zimmerman; Chairman Van de Water and Member Hunter dissenting).

In their dissent, as in *U.S. Steel, supra,* Chairman Van de Water and Member Hunter found deferral appropriate under *Spielberg* because the question of waiver of the right to sympathy strike was one of contract interpretation and the arbitrator's reliance on the broad language of the no-strike clause provided at least a reasonable basis for finding that the right had been waived. In their view, the majority applied an improper deferral standard, rather than the *Spielberg* "clearly repugnant standard," when the majority concluded that the abritrator's interpretation of the no-strike clause was "palpably wrong" because he did not follow clear precedent interpretating the Act. Since the arbitrator's award was reasonable and susceptible to a permissible interpretation, the dissenters disagreed with the majority's conclusion and would have deferred to the award. Chairman Van de Water and Member Hunter had also stated earlier that they would defer solely on the basis of the broad language of the no-strike clause, even though Board and judicial precedent hold—and the arbitrator recognized—that such language, standing alone, was sufficient to find a sympathy strike waiver.

Based on a stipulated record, the panel majority in *Dunham-Bush*[26] concluded that the arbitrator's finding that unilateral changes in work rules during the term of an existing contract did not violate section 8(a)(5) and (1) was repugnant to the Act and therefore deferral was inappropriate. In the instant case, three employees, who had refused to comply with the employer's new work rules which were unilaterally implemented despite union protest and request for postponement until upcoming negotiations for a new contract, were suspended. Thereafter, the union, on behalf of the employees, filed the grievance which the arbitrator heard. The arbitrator found that the employer had not violated section 8(a)(5) and (1) because the union had not requested bargaining over the new rules and because, although the rules clearly violated the contract and had to be rescinded, the suspended employees were properly disciplined for disobeying the work rules because industrial stability required them to obey the rules while the grievances over their imposition were being resolved.

The panel majority concluded that the arbitrator's findings that the employer did not violate section 8(a)(5) and (1) because the union did not request bargaining over the changed work rules was clearly erroneous as it was settled law that a unilateral modification of an existing agreement is in dorogation of a contracting party's statutory obligation under section 8(d) and that, during a contract's term, a party is not required to bargain anew or request bargaining over matters covered by that contract. Since the arbitrator's finding was repugnant to the Act, the majority also refused to defer to the arbitration award upholding the propriety of the employees' suspensions as the employer's unilateral promulgation of the new work rule violated section 8(a)(5) and (1), and any disciplinary action imposed on employees pursuant to the rule in question also violated that section of the Act.

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[26] 264 NLRB 1347 (Members Fanning and Jenkins; Chairman Van de Water dissenting).

Dissenting Chairman Van de Water, referring to his dissent in *Propoco, supra*, argued that the majority's decision not to defer was contrary to the principles of *Spielberg*, and that they had misread the arbitration award and misconstrued the meaning of "clearly repugnant." Contrary to the implication in the majority's opinion, the Chairman stated that the arbitrator's finding that the employer had not violated section 8(a)(5) and (1) was limited to the union's general contention that the employer failed to bargain and did not include the separate contention that the rules modified the contract. In this context, he found that the arbitrator's determination was not repugnant to the Act. Further, he stated that the arbitrator had addressed the issue of whether the contract had been modified and had found that the new rule violated the contract and had ordered the employer to rescind the rule. The Chairman thus asserted that the unfair labor practice issue regarding the promulgation of the rule had been resolved, pointing out that the Board "holds that not every unilateral change in breach of a bargaining agreement gives rise to an unfair labor practice." Further, he did not agree with the majority that the arbitral decision upholding the employees' suspensions was repugnant to the Act because, in his view, the obey-and-grieve principle as applied by the arbitrator was consonant with the principles of *Spielberg* deferral and because the issues in dispute were cognizable within the broad grievance and arbitration proceeding of the contract. As the arbitrator had a reasonable basis for finding that the employees were insubordinate and thus an arguable basis for finding that their refusal to obey the rule was unprotected, Chairman Van de Water concluded that, since the award was susceptible to a permissible interpretation, it could not be characterized as clearly repugnant to the Act.

In response, the majority specifically stated that they did not adopt any of the criteria cited by the Chairman as support for the finding that the employer did not modify the contract by promulgating the new work rule. While conceding that not every default in contractual obligations was a modification of a contract within the meaning of section 8(d), they found that the employer's default, which effected a substantial change in a term or condition of employment, amounted to such a modification. Specifically, the majority found no statutory or policy support for limiting contractual modifications violative of the Act to "basic" terms and conditions of employment and that the employer's subjective good faith was immaterial. With respect to the Chairman's possible suggestion that a finding of unilateral action did not violate the Act if reasonable minds could differ in their contract's application to such action, the panel majority argued that the Board's practice of discerning the parties' intent from the terms of the contract serves the statutory policy and the collective-bargaining procedure better than finding agreement based only on express and unambiguous contractual terms which would give maximum scope to unilateral action.

B. Deferral Where Proceedings Repugnant to Purposes of NLRA

In *Furr's,*[27] the Board majority found deterral to an arbitrator's award concerning revocation of dues-checkoff authorizations was appropriate where, in addition to meeting the other procedural requirements under *Spielberg,*[28] the decision of the arbitrator was not repugnant to the Act. Accordingly, they found that the employer did not violate section 8(a)(5) and (1) of the Act by honoring the employees' withdrawal requests.

In the underlying arbitration proceeding, the arbitrator had found that the absence of contractual language evidencing an intent to incorporate by reference administrative machinery governing revocation of checkoff authorizations indicated that the parties intended that matters pertaining to checkoff be controlled exclusively by a clear and comprehensive contractual clause which did not contain escape period limitations on revocation and by a clause which prohibited the employer from entering into any agreement with employees in conflict with the terms of the contract. Concluding that, as the checkoff authorization form set forth limitations on revocations, it was in conflict with the contract and therefore unenforceable, he upheld the employer's recognition of employees' dues revocations submitted in accordance with the contractual language.[29]

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[27] 264 NLRB 554 (Chairman Van de Water and Members Zimmerman and Hunter; Member Fanning concurring; Member Jenkins dissenting).

[28] *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

[29] Shortly after the above award, the parties executed a new contract containing the above-mentioned clauses. This issue, involving other employee checkoff revocations, was again brought before an arbitrator who reached the same conclusion as the first arbitrator.

In deferring to the arbitration award, the Board majority pointed out that it was well established that disputes as to dues-revocation procedures did not involve interpretation and application of the Act, but involved essentially contract interpretation which, the Board has recognized, were fully capable of resolution through arbitration and that the arbitrators clearly had based their opinions on an interpretation of the contract.

Further, the majority found that the arbitration award was not "clearly wrong as a member of law," noting that in *Shen-Mar,*[30] on which the General Counsel relied in arguing that deferral was inappropriate, the parties negotiated an agreement which by its terms "clearly incorporated by reference the voluntary checkoff authorizations" and therefore the employer was obligated to honor the revocation procedures contained therein. In contrast, the Board majority observed that in the instant case the arbitrators determined that the contract provided comprehensively for initial checkoff procedures, and, consequently, there was no need to refer to an external source for clarification of the parties' unambiguous commitments. They concluded that here the arbitrators merely defined the revocation procedures for which the parties had bargained and mutually were bound to honor.

In a concurring opinion, Member Fanning took the position that the employer acted in accordance with its interpretation of the contract, which had been vindicated by the arbitration awards, and further that the awards had become a constituent element in the parties' bargaining history with the inclusion in the subsequent contract of provisions identical to those upon which the employer relied. Member Fanning stated that, in most cases, the inference is warranted that checkoff authorization forms are incorporated into the collective-bargaining agreement, absent contract wording on bargaining history to the contrary. He emphasized that, unlike the employer here, the employer in *Shen-Mar* did not rely on an interpretation of the contract supported by the bargaining history, but instead contended that the State's right-to-work law precluded it from deducting dues of employees who terminated union membership.

Dissenting Member Jenkins found deferral inappropriate, disagreeing with the majority's adoption of the arbitrator's treatment of contractual silence as a union waiver of any right to administer checkoff procedures, as set forth on the authorization forms. He also found that *Shen-Mar,* where the Board has held that it would not infer a unilateral surrender of union rights, was controlling and that the arbitrators' awards were "plainly and wholly at odds with that precedent." In so doing, Member Jenkins rejected the majority's reliance on the contractual language regarding the prohibition against entering into conflicting agreements as support for the finding that the parties intended the contract to be silent with respect to specific revocation procedures, pointing out that the majority itself had found the contract covered only the initial period of irrevocability in accord with the Act. He thus argued that the majority, in fact, relied on a "contractual term" inferred from contractual silence to determine that a conflict existed.[31]

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[30] In *Shen-Mar Food Products,* 221 NLRB 1329 (1975), enfd. 557 F.2d 396 (4th Cir. 1977), the Board held that waiver of rights cannot be inferred, absent specific language or bargaining history demonstrating an intent to waive.

In *Pet, Bakery Div.*,[32] the Board majority agreed with the administrative law judge that deferral to an arbitrator's award was appropriate under *Spielberg*,[33] and that the 8(a)(5) complaint should be dismissed, finding that the issues involved turned on contract interpretation and that the award was not clearly repugnant to the Act.

In the underlying arbitration proceeding, which involved a grievance arising out of the discharge of strikers who had protested the employer's implementation of stricter work rules regarding reporting of absences and stricter disciplinary actions regarding unexcused or excessive absences, the arbitrator found that the new work rules did not conflict with the existing contract provisions. For example, he decided that the work rule relating to the number of excused absences warranting termination simply delineated what constituted "excessive excused absences." The arbitrator also found that the employer engaged in good-faith bargaining over the proposed rules and had implemented them only after reaching impasse, and that, therefore, the employer had not violated section 8(a)(5) and (1).

The administrative law judge, in deferring to the arbitrator's decision, distinguished this case from *Murphy Diesel* [34] on the ground that the employer in this case had never taken the position that its new rules were not grievable, and there was no clear deprivation of a contractual benefit as there had been in *Murphy Diesel.* In this regard the administrative law judge found that the contract permitted the employer to take a consistent or standard approach on what constituted excessive excused absenteeism notwithstanding its prior *ad hoc* approach to the matter. In adopting the administrative law judge's conclusions that the arbitrator's decision was not clearly at odds with Board precedent or otherwise repugnant to the Act, the Board majority emphasized the absence of conflict with the contract, particularly noting that the rules were grievable and there was no change in the grievance arbitration provisions, in contrast to *Murphy Diesel, supra,* where an employer changed the grievance arbitration procedure by making a matter that had been grievable under the contract not grievable.[35] The majority also agreed with the administrative law judge that the arbitrator's findings with respect to the employer's good-faith bargaining were entitled to deference since the arbitrator had an arguable basis for his conclusion that the parties had reached impasse and that the employer, after reaching impasse, was entitled to implement the proposed rules and since they were consistent with Board precedent.

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[31] In reply to Member Jenkins that the majority had affirmed the arbitral finding that the union had waived its right to bargain about dues-revocation procedures, the majority emphasized that no such waiver finding was in issue since the parties intended that the sufficient and clear contract terms be controlling exclusively.

[32] 264 NLRB 1288 (Chairman Van de Water and Members Zimmerman and Hunter; Members Fanning and Jenkins dissenting).

[33] *Spielberg Mfg. Co., supra.*

[34] In *Murphy Diesel Co.*, 184 NLRB 757 (1970), the Board found that the employer's change from a "loose" and "lax" to a stricter absenteeism system without bargaining with the union constituted a material, substantial, and significant change which violated sec. 8(a)(5). In so doing, the Board found that, by refusing to consider a grievance based on a contractual benefit lost as a result of the new rules, the employer had grafted an ungrievable condition on receipt of a contractual benefit and thus had the effect of modifying the contract.

Dissenting Members Fanning and Jenkins contended that, by deferring to the arbitration award, the majority sanctioned the unilateral midterm modification of a contract by one of the parties without the consent of the other, and approved a result clearly repugnant to the Act. They disagreed that the new work rules were not in conflict with the contract, arguing that the work rules for absenteeism which replaced the *ad hoc* individual approach established more rigid attendance requirements which thereby modified the contract. The dissenters disagreed with the majority that, because the new rules were grievable, there was no deviation from the contract. They cited *Dunham-Bush*[36] in support of their argument that the willingness and ability of a party to a contract to grieve the rules change did not mean that a unilateral change in the contract did not take place. Members Fanning and Jenkins stated that the majority's argument was a *non-sequitur* and cited *Dunham-Bush, supra,* finding a violation of section 8(a)(5) in a new prohibition of employees from leaving the premises during lunch hours. In response, the majority stated that the tightening of work rules did not necessarily result in the modification of a contract, that work rules, as separate from the collective-bargaining contract, could be changed as long as they did not conflict with the contract, and that the dissent's apparent wish to interpret the contract differently was no basis for refusing deferral.

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[35] Member Zimmerman also distinguished this case from *Dunham-Bush, supra,* cited by the dissent, where the changes in the work rules in question clearly violated the contract and the arbitrator erroneously concluded there was no 8(a)(5) violation because the union had not requested bargaining.

[36] 264 NLRB 1347.

In *Liberal Market* [37] the panel majority agreed with the administrative law judge that it was appropriate to defer, under *Spielberg,* to an arbitrator's award, which found that the employer was not obligated to bargain over its decision to close its garage and warehouse operations and that it had not bargained in bad faith by failing to reveal the contemplated closure during negotiations. With respect to the duty to bargain, the majority noted that the determination of whether an employer had a duty to bargain over a decision to close a portion of its operations involved delicate balancing of some competing interests and that whether, upon the facts herein, the employer had the duty to bargain about its decision would have been a close question under Board precedent prior to *First Natl. Maintenance* [38] and would present an even more difficult question since the issuance of that decision. Accordingly, they concluded that, in their opinion, it could not be said that the arbitrator's resolution of the duty-to-bargain issue was repugnant to the policies of the Act, especially in the light of *First Natl. Maintenance.* Further, for reasons stated by the administrative law judge, the majority found not to be repugnant to the Act the arbitrator's conclusion that the employer did not bargain in bad faith by failing to disclose during negotiations its consideration of closing its warehouse and garage. The administrative law judge had found no direct evidence supporting an allegation that the employer had negotiated its present agreement with the union with the knowledge that it intended to eliminate certain business units, and, further, found that the case precedent, relied on by the General Counsel in arguing that the employer had bargained in bad faith, did not support the conclusion that nondisclosure of nonfinal, though relevant, nternal business deliberations violated section 8(a)(5) and (1) of the Act.[39]

In his dissent, Member Jenkins concluded that deferral was inappropriate, finding the arbitration award inconsistent with, and contrary to, Board precedent and repugnant to the policies of the Act. With respect to the finding that the employer was not obligated to bargain over the decision to close down, he argued that the case was factually distinguishable from *First Natl. Maintenance, supra,* where a partial closing was involved, while in the instant case subcontracting was, in effect, involved. He would thus rely on *Ozar* *Trailers,*[40] and *Fiberboard Paper Products Corp.* v. *N.L.R.B.*[41] i finding that the employer had a duty to bargain about the decisio to close. Member Jenkins would also find that in failing to disclos to the union the increasing possibility that the business would b closed down, the employer, in violation of the Act, made a "sham o the bargaining process," citing *Vac-Art, supra,* and *Royal Polishin* *& Plating Co., supra.*

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[37] 264 NLRB 807 (Members Zimmerman and Hunter; Member Jenkins dissenting).

[38] In *First Natl. Maintenance Corp.* v. *NLRB,* 452 U.S. 666 (1981), the Supreme Court held hat an employer has no duty to bargain over the decision to close part of its business oper-tions.

[39] He rejected the General Counsel's reliance on *Vac-Art,* 124 NLRB 989 (1959), where an emloyer, without having previously apprised the union of its intentions, announced a closedown in ne course of negotiations, and on *Royal Plating & Polishing Co.,* 160 NLRB 990 (1969), where ne employer had reached a final decision to close down the plant at the time of negotiations ut did not inform the union until 3 weeks after the contract was executed. The administrative aw judge stated that, in those cases, the employers' conduct during negotiations was only part f the totality of circumstances considered in making a bad-faith finding.

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[40] 161 NLRB 561 (1966).
[41] 379 U.S. 203 (1964).

IV

Representation Proceedings

The Act requires that an employer bargain with the representative designated by a majority of its employees in a unit appropriate for collective bargaining. But it does not require that the representative be designated by any particular procedure as long as the representative is clearly the choice of a majority of the employees. As one method for employees to select a majority representative, the Act authorizes the Board to conduct representation elections. The Board may conduct such an election after a petition has been filed by or on behalf of a group of employees or by an employer confronted with a claim for recognition from an individual or a labor organization. Incident to its authority to conduct elections, the Board has the power to determine the unit of employees appropriate for collective bargaining and formally certify a collective-bargaining representative on the basis of the results of the election. Once certified by the Board, the bargaining agent is the exclusive representative of all employees in the appropriate unit for collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment. The Act also empowers the Board to conduct elections to decertify incumbent bargaining agents who have been previously certified, or who are being currently recognized by the employer. Decertification petitions may be filed by employees, by individuals other than management representatives, or by labor organizations acting on behalf of employees.

This chapter concerns some of the Board's decisions during the past fiscal year in which the general rules governing the determination of bargaining representatives were adapted to novel situations or reexamined in the light of changed circumstances.

A. Qualification as Labor Organization

In *St. John's Hospital & Health Center,*[1] the Board considered whether petitioner, a state nurses association, evidenced a conflict of interest sufficient to preclude it from representing certain of the

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[1] 264 NLRB 990 (Chairman Van de Water and Members Jenkins, Zimmerman and Hunter; Member Fanning dissenting).

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employer's employees. In this case, the employer, which operated a large general acute hospital, contended that a conflict of interest disqualified the petitioner, California Nurses' Association (CNA), from seeking to represent nurses employed by the employer because petitioner also controlled and operated a registry service which referred nurses, for a fee, to private duty nursing positions, some in health care facilities, and to temporary staff positions at health care facilities. It argued that the petitioner's registry referrals of nurses to positions with the employer, or with patients of the employer, created a business relationship between the employer and the petitioner apart from, and in potential conflict with, the petitioner's role as bargaining representative of the employer's employees. The Board majority found merit in this contention, relying on the recent decision in *Visiting Nurses Assn.*[2] involving a similar CNA registry service. It also concluded that there was no record support for the petitioner's bare assertion that it had segregated and separated its referral services from its collective-bargaining activities. Further, the Board majority rejected dissenting Member Fanning's characterization of the CNA's registry as a hiring hall since the registry's employment referral service was not limited to employers who were signatory to a collective-bargaining agreement.[3] It pointed out that in *Visiting Nurses,* under very similar circumstances, a unanimous Board, including then Chairman Fanning, found CNA's operation of its registry to constitute the operation of a business.

The petitioner also had contended that the facts herein were distinguishable from those in the seminal *Bausch & Lomb* decision[4] and in *Visiting Nurses* because the employer was not in the referral business and, therefore, not in direct competition with CNA's referral services. The Board majority, however, noted that "[t]he principles underlying the conflict-of-interest doctrine are not limited to a factual situation in which the employer and the union are in the same business." In this case, it found that the petitioner looked upon the employer as a customer and that its financial interest in maintaining and enhancing this relationship would conflict with "the requirement that a collective-bargaining agent have a 'single-minded purpose of protecting and advancing the interests' of unit employees."[5] Thus, the Board majority pointed out that the petitioner might demand, in collective bargaining, that the employ-

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[2] *Visiting Nurses Assn. Serving Alameda County,* 254 NLRB 49 (1981) (then Chairman Fanning and Members Jenkins, Penello, and Zimmerman).

[3] The Board noted that, if referrals were limited to those employers who were signatory to a collective-bargaining agreement, "then the registry might well be a hiring hall which would not pose the conflict we have found."

[4] *Bausch & Lomb Optical Co.,* 108 NLRB 1555 (1954).

[5] *Ibid.* at 1559.

use the CNA registry exclusively to fill temporary staff posi-
ons, or to refer patients seeking private duty nurses. The Board
so noted that when the petitioner began organizing the employ-
's employees, the employer stopped using the CNA registry re-
lting in a substantial loss of revenue for CNA. Accordingly, it
ncluded that the CNA had interests outside its bargaining capac-
y and dismissed the petition.

Member Fanning dissented, arguing that the majority decision
tablished a new and broader standard for conflict of interest
hich modified settled Board policy and would disqualify virtually
y labor organization which operates a hiring hall. Further, he
gued that the majority opinion finds a disqualifying conflict of in-
rest based on sparse record evidence. In this regard he argued
at there was no basis to find that petitioner had a financial moti-
tion to increase registry referrals at the expense of represented
nployees absent evidence that the registry was a source of income
r the petitioner, or that registry income "would be used for any-
ing other than the administration of the referral system."
ember Fanning disagreed with the majority that the employer
d met its "considerable burden" of establishing a "clear and
esent" danger that CNA might have such a conflict of interest.[6]
deed, he argued, CNA's registry service was essentially a nonex-
usive hiring hall, a common function of labor organizations, for
hich a service fee is often charged. Accordingly, he would not dis-
iss the petition on alleged conflict-of-interest grounds.

In *Amoco Production Co.,*[7] the Board majority held that an unaf-
iated local union could not properly affiliate with an internation-
union through a vote of union members which excluded other
nployees in the affected bargaining unit as the members-only
te was held to violate "fundamental due process standards." Con-
quently, the employer in that case was held not to have violated
ction 8(a)(5) of the Act when it refused to bargain with the newly
filiated local union.[8] The majority noted that the Board has con-

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Citing *Bridgeport Jai Alai,* 227 NLRB 1519, 1520 (1977); *H. P. Hood & Sons,* 182 NLRB 194,
(1970).

262 NLRB 1240 (Chairman Van de Water and Members Jenkins and Hunter; Members Fan-
g and Zimmerman dissenting).

This was the Board's Third Supplemental Decision and Order in this case. In the original
ision, *Amoco I,* 220 NLRB 861 (1975) (then Chairman Murphy and Member Fanning; Member
kins dissenting), the Board found that the employer had violated sec. 8(a)(5) by refusing to
gain with the affiliated union. In a Supplemental Decision and Order, *Amoco II,* 233 NLRB
(1977) (then Chairman Fanning and Members Jenkins and Murphy), the Board ordered the
ployer to reimburse the union for dues it had failed to withhold and remit. Thereafter, it
ided *sua sponte* to reconsider its decision, and subsequently issued its Second Supplemental
ision and Order, *Amoco III,* 239 NLRB 1195 (1979) (then Chairman Fanning and Member
rphy; Member Truesdale concurring; Member Jenkins dissenting; Member Penello dissenting
arately), in which it reaffirmed its earlier Decision and Order. Thereafter, the United States
rt of Appeals for the Fifth Circuit denied enforcement of the Board's Order and remanded
case to the Board for further factfinding as to whether the affiliated local union was a suc-
or to the unaffiliated local (613 F.2d 107 (1980)). In this decision, the Board found that the
liation vote was invalid, and that it was unnecessary to determine the successorship issue.

sistently held that "there are certain due process requirements which must be met in order to have a valid affiliation election." They quoted from the decision in *Jasper Seating Co.,*[9] where the Board stated that "[i]t appears basic to the collective-bargaining process that the selection of a bargaining representative be made by the employees in the bargaining unit" and that "a cardinal prerequisite to any change in designation of the bargaining representative is *that all employees* in the bargaining unit be afforded the opportunity to participate in such selection." They also distinguished affiliation votes from such matters as strike votes and contract ratification votes which, the dissent urged, are internal union matters into which the Board does not ordinarily intrude; unlike such matters, the Board majority found, affiliation is directly related to "matters within the breadth of the Act" and "the Board's own election and certification procedures."

Further, the Board majority disagreed with the dissent that adequate due process was satisfied because all bargaining unit employees were afforded the opportunity to join the union and thus become eligible to participate in the affiliation election since, to the majority, a rule would impinge on the employees' section 7 rights to participate in or to refrain from engaging in such activity.[10]

Members Fanning and Zimmerman dissented, arguing that affiliation is an "internal union affair" into which the Board generally will not intrude and that other internal union decisions, such as contract ratification, have as much, if not more, impact on nonmembers as an affiliation vote. Further, they asserted that, as all employees are free to join the union and participate in its affairs, the rule requiring union membership does not impinge on any section 7 right because the employees are responsible for their own disenfranchisement. The dissent also argued that any tension between the rights of the two groups must be resolved in favor of union membership since union members are most affected by union affiliation which has only an indirect effect on other unit members. As unit members were afforded the opportunity to join the union and participate under normal union rules, the dissent would have found the affiliation vote without nonmembers participation to be valid and not violative of due process.

During the report year, the Board also decided two cases involving the impact of mergers between two international unions on the

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[9] 231 NLRB 1025, 1026 (1977) (Members Jenkins and Walther; Member Penello concurring; then Chairman Fanning and Member Murphy dissenting).

[10] The majority found unpersuasive the dissent's argument that the vote tally was such that, even if all nonmember employees had voted against affiliation, the outcome would not have changed. It stated that its purpose was "to insure adequate due process in all affiliation votes," and that "the effect of the exclusion cannot be measured by a mere numerical tally." Quoting from Member Jenkins' dissent in *Amoco Production Co.*, 220 NLRB 861.

Board's certification of one of the unions or an affiliated local. Both cases arose from the merger of the Amalgamated Meat Cutters and Butcher Workmen of North America with the Retail Clerks International Union to form the United Food and Commercial Workers International Union (UFCW). In *Texas Plastics,*[11] the Meat Cutters were certified as the collective-bargaining representative of the employer's production and maintenance employees and, following prior argeements, the employer and Meat Cutters Local 171 entered into a collective-bargaining agreement. After the merger of the Meat Cutters and the Retail Clerks, the UFCW advised Meat Cutters Local 171 it was issuing a new charter reflecting the UFCW as the international union. The Board affirmed a regional director's decision to amend the certification to substitute UFCW Local 171 as the bargaining representative finding that the identity and continuity of the bargaining representative had been preserved after the merger. The employer had contended that the change in name was improper because its employees and Local 171's members did not participate in or ratify the merger. In rejecting this contention the Board noted that the identity and continuity of the bargaining representative had been preserved after the merger and Local 171 had retained the same officers, staff, dues structure, bylaws, and geographical jurisdiction it had had before the merger, and that nothing changed but the name. In addition, it pointed out that while Local 171 and its members did not vote on the merger, they had the opportunity to send delegates to the special merger convention, but did not do so. Further, the Board also pointed out that the employees, by their membership, were bound by the Meat Cutters constitution, which expressly authorized the international executive board to merge the Meat Cutters with other unions. Accordingly, it concluded that the merger of the two international unions did not affect representation at the local level.

In *Knapp-Sherrill Co.,*[12] the Board affirmed the regional director's decision to amend the certification of Meat Cutters Local 173 to substitute the name of UFCW Local 171 to reflect that local's merger into Meat Cutters Local 171, with the latter as the surviving entity.[13] The members of the locals were notified of separate meetings at which the merger was to be considered and at these meetings each local had approved the merger. The employer opposed the petition contending that the merger process did not provide adequate due process safeguards primarily because union members and nonunion members were not afforded an opportunity to participate in the merger vote and because the merger resulted in a substantially different local union. The Board found the employer to be estopped from challenging, and to have effectively waived the right to challenge, the merger procedures because it had recognized and dealt with the merged Local 171 as the successor to Local 173, even though it knew it had grounds to challenge the merger. Further, the employer raised the issue some 2 years after the merger, only when the collective-bargaining agreement expired and when Local 171 requested negotiations for a new contract. To consider the merits of the challenge at that time, the Board held, would "[disrupt] the bargaining relationship at a time when Local 171's role as bargaining representative is most vital to the employees . . . ." [14]

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[11] 263 NLRB 394 (Chairman Van de Water and Members Fanning, Jenkins, Zimmerman, and Hunter).

[12] 263 NLRB 396 (Chairman Van de Water and Members Fanning, Jenkins, Zimmerman, and Hunter).

[13] Meat Cutters Local 171 was the same local involved in *Texas Plastics, supra.* The employer in this case also challenged the subsequent merger of the Meat Cutters and Retail Clerks Internationals, into the UFCW, but the Board rejected that contention on the same grounds as in *Texas Plastics.*

In any event, the Board concluded that the record established that Local 171 was a continuation of Local 173. It observed that bylaws and grievance procedures remained virtually the same, a business agent continued to service the geographic area formerly represented by Local 173, negotiations were conducted in the same manner, and the surviving Local 171 had in all respects assumed Local 173's responsibility for administering its collective-bargaining agreement with the employer. Although the former members of Local 173 paid somewhat higher dues as a result of the merger, the Board held the increase was neither so substantial nor of such singular significance as to overcome the finding of continuity.

B. Status as Employees

A bargaining unit may include only individuals who are "employees" within the meaning of section 2(3) of the Act. The major categories expressly excluded from the term "employee" are agricultural laborers, independent contractors, and supervisors. In addition, the statutory definition excludes domestic servants, or anyone employed by his parent or spouse, or persons employed by a person who is not an employer within the definition of section 2(2).

1. Independent Contractors

The statutory definition of "employee" expressly excludes independent contractors. In determining independent contractor status, the Board has applied the "right of control" test. Generally, where the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment. One the other hand, where control is reserved only as to the result sought, the relationship is that of independent contractor. The resolution of this question depends on the facts of each case and the Board follows the ordinary tests of the law of agency in determining whether individuals are covered by the Act.[15]

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[14] Chairman Van de Water and Member Hunter noted that, as they agreed that the employer had waived its right to challenge the merger procedure, they found it unnecessary to rely, as did the regional director, on *Amoco Production Co.*, 239 NLRB 1195 (1979).

In the report year, the Board decided three cases on independent contractor status. While continuing to apply the right-of-control test, the Board acknowledged the difficulty of its application, requiring as it does, the balancing of numerous factors and the distinguishing of cases which are in some respects similar. Thus, the Board cautioned in *Austin Tupler Trucking & Gold Coast:* [16]

> Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other.
>
> There are, in the instant case, as is usual in these cases, certain factors that may be indicative of employee status as well as factors indicative of independent contractor status. To decide on which side of the line these drivers fall requires more than a quantitative analysis based on adding up the factors on each side; it requires the difficult task of assessing the relative significance of each factor, and ultimately each set of factors, in light of the impact of each factor on the overall relationship between the drivers and the Employer.

In *Austin Tupler,* a Board panel considered the status of owner-operator truckdrivers who leased their trucks to the employer, a transportation contractor which delivered materials to construction sites. A union sought to represent these owner-operators as employees of the employer, who in turn contended that they were independent contractors.

In affirming the regional director's dismissal of the union's petition, the panel found that the owner-operators who either made the deliveries themselves or hired other drivers to do so, were independent contractors. Under the lease agreement between the employer and owner-operators, the latter were required to furnish the equipment and driver (usually the owner himself) to the employer.

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[15] See 37 NLRB Ann. Rep. 60 (1972); 40 NLRB Ann. Rep. 65 (1975); 41 NLRB Ann. Rep. 61 (1976); 42 NLRB Ann. Rep. 61 (1977).

[16] 261 NLRB 183 (Members Fanning, Jenkins, and Zimmerman), quoted in *Perrysville Coal Co., infra,* 264 NLRB 380.

However, the owner-operators could hire a driver without the employer's permission. They also had to provide workers' compensation coverage for their drivers. The employer had no workers' compensation coverage and did not deduct taxes or social security from its payments to the owner-operators.

The owner-operators had "a very substantial investment" in their trucks and they were responsible for fueling and maintaining the trucks, paying all taxes and fees, and indemnifying the employer for losses arising from their operation. The employer also handled bookkeeping for owner-operators, but provided no free services such as credit, insurance, or processing of permit applications. The employer required a certain type of truck which also displayed the employer's name but the owner-operators were found to "exercise entrepreneurial judgment regarding the mechanical specifications of the trucks." The employer imposed no safety requirements and did not inspect the trucks, even though the lease agreement required the owner-operators to conform to the employer's and any governmental safety requirements. The employer did not have any rules on the details of truck operation, and did not require a physical examination or a driving test for its drivers.

The panel found that the owner-operators operated with a high degree of independence. Thus, they could work for others during the term of the lease, they set their own hours, consistent only with the needs of the customers, and could refuse assignments from the employer without penalty. They received their assignments by calling the employer's dispatch office, and, rather than reporting to a terminal, picked up materials directly from the supplier. They were paid by the job, generally receiving 90 percent of the employer's gross fee from its customers. Although this fee was based on the employer's estimate of the shortest route for the particular delivery, the employer did not directly control the drivers' routes. It did not supervise the operators' work, nor require that they submit time logs or other routine reports.

The panel specifically pointed out that many of these factors distinguished the instant cases from cases where the Board had found owner-operators to be employees.[17] Thus, it noted that government regulations played almost no role in the relationship between the employer and the owner-operators, since the operation was mainly intrastate trucking in Florida, and Florida had substantially deregulated trucking in 1980 thereby "largely eliminating the Employer's legal responsibility for supervising the owner-operators in the performance of their contracts." The owner-operators were not required to submit routine reports, were free to choose, within certain limits, their hours of work, and could refuse job assignments and work for others. The employer provided relatively few services to the owner-operators, and did not supervise the work, either directly or indirectly. Accordingly, the panel concluded that the relationship between the employer and the owner-operators was more closely akin to that of agent-client rather than employer-employee and that the owner-operators were not employees within the meaning of the Act.

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[17] Citing *Mitchell Bros. Truck Lines*, 249 NLRB 476 (1980), and *Rediehs Interstate*, 255 NLRB 1073 (1981).

In *Perryville Coal Co.,*[18] the Board panel considered the question of whether certain truckdrivers were either independent contractors or employees of independent contractors, rather than employees of the employer. In this case, the employer had a collective-bargaining agreement with a union covering 12 owner-operators and 24 drivers who did not own trucks. The employer unilaterally decided to revamp its operation and its method of payment and to discontinue the payment of benefits and the withholding of taxes. Shortly thereafter it terminated the services of all 36 drivers. In its response to the allegations of a violation of section 8(a)(5), the employer contended that the drivers had always been independent contractors and therefore outside the protection of the Act.

In finding that the drivers were employees and that the employer violated section 8(a)(5) by its unilateral changes, the panel noted numerous distinctions between this case and similar cases where the Board had found owner-operator drivers to be independent contractors.[19] In its view, a significant manifestation of the employer-employee relationship was the contractual collective-bargaining relationship between the employer and the union, and the provision in the agreement between the employer and the union which gave the employer the exclusive right to manage operations, direct the work force, and hire, fire, and discipline drivers. While the employer did not in practice exercise its contractual right to hire drivers (the owner did their own hiring), the panel found that the employer had exercised its corresponding right to discharge drivers, as evidenced by its termination letters to all drivers, regardless of whether they owned their own trucks. The panel found these individual termination letters to all drivers to be clear evidence that the employer considered and dealt with all drivers as its employees.

In addition to the existence of a collective-bargaining agreement between the employer and the union, the employer's right under that contract to hire and discharge drivers, and its actual termination of the employment status of all drivers, the panel also found evidence of an employer-employee relationship in the employer's reliance on seniority to implement layoffs of drivers; its maintenance of payroll records and withholding of taxes, social security, and union dues for drivers; its payment of workmen's compensation and unemployment insurance; its contributions to the union's health and retirement benefits plan; its disciplining of drivers; and its imposition of operating guidelines for drivers. Also, the panel found that the employer made it abundantly clear, through its own draftmanship, that it considered the drivers to be—and dealt with them as—its employees, since the truck lessee agreements themselves describe the drivers as employees of the employer.

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[18] 264 NLRB 380 (Members Fanning, Jenkins, and Zimmerman).

[19] Citing *Kentucky Prince Coal Corp.*, 253 NLRB 559 (1980), and *Tarheel Coals*, 253 NLRB 563 (1980).

The panel also found that the employer also exercised significant control over the manner and means of the drivers' performance of their duties. Thus, it had disciplined drivers for tardiness and unexcused absences, gave its drivers specific operating guidelines as to the use of tarpaulins, the prohibition against the use of engine brakes, the safety spacing between trucks, and the restriction of certain routes. Accordingly, the panel concluded that the truckdrivers were employees within the meaning of the Act.

In *Yellow Taxi Co. of Minneapolis, d/b/a Suburban Yellow Taxi Co.,*[20] the Board, *sua sponte* reconsidered its original decision in that case.[21] On reconsideration, the majority found that lessee cabdrivers were employees rather than independent contractors and affirmed the Board's original decision that the employer isolated section 8(a)(5) of the Act by refusing to bargain with the union. In the original decision, the Board had adopted the administrative law judge's finding that the case was "not materially distinguishable" from *Yellow Cab. Co.,*[22] herein called *Chicago Yellow Cab,* where the Board had also found cabdrivers there to be employees. But the United States Court of Appeals for the District of Columbia denied enforcement of the Board's order in *Chicago Yellow Cab,* because it disagreed with the Board's finding that the drivers there were employees rather than independent contractors.[23] Subsequently, however, in *City Cab Co. of Orlando* v. *NLRB,* 628 F. 2d 261 (D.C. Cir. 1980), the court agreed with the Board's determination that the cabdrivers in the case were employees, not independent contractors. In doing so, the court noted what it considered to be substantial distinctions between the working relationships in *Chicago Yellow Cab* and in *City Cab of Orlando.* In view of the court's decision in the latter case, the Board, *sua sponte,* reconsidered its decision and rationale in the original *Yellow Taxi of Minneapolis* case, reexamined and ultimately disavowed its earlier reliance on *Chicago Yellow Cab*, and, noting material distinctions between that case and the instant case, affirmed its original conclusion in the instant case; i.e., that the lessee cabdrivers therein were employees, rather than independent contractors.

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[20] 262 NLRB 702 (Members Fanning and Jenkins; Member Zimmerman concurring; Chairman Van de Water and Member Hunter dissenting separately).

[21] 249 NLRB 265 (1980).

[22] 229 NLRB 1329 (1977).

[23] *Loc. 777, Democratic Union Organizing Committee, Seafarers Intl. Union* v. *NLRB,* 603 F.2d 862 (D.C. Cir. 1978), rehearing denied 603 F.2d 891 (1979).

In finding the cabdrivers to be employees, the Board majority relied on numerous characteristics of the relationship between the lessee-drivers and the lessor-employer which, it found, reflected that the employer not only controlled the result to be achieved by the drivers, but also the means by which they effected that result. Thus, the employer required its drivers to maintain a trip sheet on all trips and to submit a copy of it to the employer. It also set airport delivery rates unilaterally, and maintained contracts with customers to provide transportation at flat rates, with some of the contracts prohibiting tips. Drivers were not permitted to solicit the employer's flat rate customers, except in response to a dispatch call, and were required to reimburse overcharges, thereby significantly restricting a lessee's opportunity to exercise entrepreneurial initiative. The employer enforced these rules through denial of leases to drivers who did not comply. The rate and trip sheet policies were also found to function as a monitoring device by which the employer kept track of the amount of the drivers' business and therefore was able to control their source of business.

The Board majority adverted to other factors that manifested an employer-employee relationship. Thus, the employer prohibited subcontracting, instructed lessees to keep mileage to a minimum, unilaterally determined fault in case of an accident, warned lessees against speeding, unilaterally changed financial terms of the lease, and set *de facto* minimum hours of employment. In addition, lessee drivers acquired no equity in the cabs and had a permanent working relationship with the employer despite the short-term duration of the leases. The goodwill generated by the drivers' services inured to the benefit of the employer, which could deny leases if it received customer complaints.

While drivers had the right under the lease, to decline dispatch orders and to decline orders from the employer's airport starter system, the majority found that they were effectively prevented from doing so because they were dependent on the dispatch system as the supplier of their business and because they would have to give up their place in airport lines. Although some of the employer's rules, such as those respecting trip sheets, were required in part by local law, the majority found that the employer's requirements exceeded compliance with the law, and that some were not governed by law. Moreover, the majority stated that it was possible for the mandatory legal requirements to become so detailed, and consequently to bind the parties so closely together operationally that compliance prevented the existence of an independent contractor relationship, and rather ensured that of employer-employee.

Member Zimmerman concurring filed a separate opinion to discuss the adverse decision of the court of appeals in *Chicago Yellow Cab, supra.* He found the court's criticism, that Board decisions on independent contractor status were marked by "an unusual amount of confusion and vacillation," was harsh and unwarranted. He pointed out that each case had to be decided on its own facts, and that some variation in Board precedents was inherent in the congressional scheme of staggered 5-year appointments of Board members. In analyzing and balancing the facts in particular cases, Member Zimmerman would find certain evidence to be particularly relevant to finding employee or independent contractor status. For example, driver ownership of or substantial investment in the cab is indicative of independent contractor status. On the other hand, where the only investment of the driver is a lease payment, and there are mileage restrictions and subleasing prohibitions, there would be a strong indication of employee status. Member Zimmerman found that the analysis and conclusions of the court of appeals in *Chicago Yellow Cab* were not cognizant of the peculiarities of the taxi industry as they pertain to the employment relationship. Accordingly, he respectfully disagreed with the court's decision, and stated his adherence to the Board's original decision in the instant case.

Chairman Van de Water dissented, relying on the administrative law judge's finding that the instant case was "not materially distinguishable" from *Chicago Yellow Cab,* and on the court's disagreement with the Board's finding in that case the cabdrivers were employees and not independent contractors. Moreover, he disagreed with the majority's analysis of the driver's employee status, finding that the facts on which they focused in analyzing whether an employer-employee relationship existed were "of only minimal significance." Thus, he argued that the trip sheet rule was required by law, and was not a form of control exercised by the employer. He noted that the record reflected that drivers might refuse dispatch orders and prospect for fares, since the employer acted merely as a clearinghouse and had no incentive to monitor the drivers' business. Accordingly, the Chairman concluded that the majority's finding that the employer used trip sheets, flat rate agreements, and airport delivery rates to control the drivers was unwarranted. In addition, he disagreed that the employer received the benefit of goodwill generated by the drivers, pointing out that the tangible manifestation of goodwill, the extra revenue which resulted from prompt and courteous service, inured to the drivers. The Chairman also questioned the finding that the employer set *de facto* hours of work, noting that there was no limit on the hours drivers could work, and that the employer also leased some cabs on a weekly basis, thereby allowing drivers freedom to determine their work schedules. Moreover, he noted the employer's leasing system, which was the same as that in *Chicago Yellow Cab,* did not persuade the court that the employer regulated work hours.

Upon his objective appraisal of facts "not materially distinguishable" from *Chicago Yellow Cab,* the Chairman concluded that the drivers were independent contractors because, *inter alia,* they

> . . . do not work for hire, wages, or salary, or under supervision . . . [they] pay only their leasing fees to the [employer] and the [employer] has no right to obtain, for its own benefit, any accounting of the lessee drivers' earnings . . . [and they] depend for their income solely upon their own initiative and the profits derived from the difference between their cost of leasing and operating the cab and what they collect in fares.

Member Hunter, dissenting separately, agreed with the Chairman that this case was not materially distinguishable from *Chicago Yellow Cab,* and stated that, upon careful review of the underlying record, he was not persuaded by the majority's analysis that the drivers were employees.

2. Managerial Employees

Apart from the express statutory exclusions, Board policy also excludes from coverage managerial employees, defined as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." [24] In 1980, the Supreme Court ruled that the full-time faculty of Yeshiva University, in New York, were managerial employees.[25] At the same time, the Court noted that "[t]here . . . may be institutions of higher learning unlike *Yeshiva* where the faculty are entirely or predominantly nonmanagerial." [26] In the report year, the Board applied the principles of *Yeshiva* for the first time, deciding five cases in which employers relied on *Yeshiva,* in whole or in part, to contend that certain groups of professionals were managerial.

Ithaca College [27] involved a private nonprofit institution of higher learning. The petitioner sought to represent a unit of all the college's full-time faculty at its Ithaca, New York, location and at the Albert Einstein Medical Center in New York City. The Board dismissed the petition, agreeing with the college that the faculty members were managerial, as they possessed and exercised authority similar to that of the faculty in *Yeshiva*. The Board stated that:

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[24] *N.L.R.B.* v. *Bell Aerospace Co.,* 416 U.S. 267, 288 (1974).
[25] *N.L.R.B.* v. *Yeshiva University,* 444 U.S. 672 (1980). See 45 Ann. Rep. 175–176 (1980).
[26] *N.L.R.B.* v. *Yeshiva University, supra,* 444 U.S. at 691.
[27] 261 NLRB 577 (Members Fanning, Jenkins, and Zimmerman).

> In *Yeshiva*, the Supreme Court found that the faculty effectively determined the curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules. The Court additionally noted that the faculty's authority extended beyond strictly academic areas to such matters as hiring, tenure, sabbaticals, terminations, and promotions. Although the administration retained the power to make final decisions, the Court found that the overwhelming majority of faculty recommendations were followed.

In the instant case, the Board panel found that the college had demonstrated that its faculty possessed and exercised similar authority. It noted that faculty members comprised one-third of the academic policy committee which reviewed proposals made by the faculties of the various schools concerning changes in academic policy or curriculum. While the committee had no authority either to initiate proposals or finally to reject them, it could return a proposal to the initiating faculty for clarification or revision. The committee's work was found to be carried out in substantial part by two subcommittees—on curriculum review and policy—composed entirely of faculty, whose recommendations were invariably followed by the academic policy committee. Further, proposals approved by the full committee were then submitted to an elected faculty council, also composed entirely of faculty representatives of each academic unit. In addition, the panel observed that various faculty committees in each school were found to have established a wide range of policies affecting their own operations. Each faculty determined its own curriculum, including the courses to be offered, credit hours, class size, and prerequisites. While such faculty recommendations regarding curriculum changes in some schools required the approval of the dean, such approval was routinely forthcoming. The panel found that the faculties effectively determined policies regarding academic standing, graduation requirements, grading, attendance, course distribution requirements, and examinations, and that such policies could not be implemented without faculty approval. The faculties of each school also controlled admissions in their respective schools.

Faculty authority was also found to extend beyond strictly academic matters, into such areas as faculty hiring, tenure, and promotion. Thus, faculty search committees were found to have been effective in the selection of deans in each of the schools. The faculties of each school developed criteria for faculty tenure and promotion, and the administration followed the recommendations of the college tenure and promotion committee—composed entirely of faculty—in all but one of the 120 cases considered since the committee was formed in 1977. The faculties also participated in budget decisions, and the awarding of financial aid and teaching assistantships to students. Finally, the faculties' recommendations of additions and modifications to the college's physical plant were found to have been effective.

In *Duquesne University of the Holy Ghost,*[28] the Board, finding that the full-time faculty of the university's law school were managerial because they possessed managerial authority nearly identical to that possessed by the faculty in *Yeshiva,* dismissed the petition for a unit of full-time faculty. The law school had 14 full-time faculty, who were found to exercise significant authority over the curriculum. Although the dean had the power to "pocket-veto" faculty recommendations, there was no evidence that he had ever done so, and the school's bylaws required that the dean "obtain the consensus of the faculty on academic matters." Also, the Board noted that professors enjoyed complete freedom with respect to classroom matters, such as grading and course content, and that, when the faculty had voted to increase or reduce class size, the administration had usually adhered to its recommendations.

The faculty was found effectively to control admission and matriculation standards, within necessary accreditation guidelines. The Board also found that the faculty exercised considerable authority outside the academic sphere, with respect to hiring and tenure. Tenured faculty members sat on screening committees, and the tenured faculty voted on hiring. The dean had no authority to hire against the faculty's recommendation and in only one instance had he prevented the faculty from voting on a candidate whom he considered unfit. Also, tenure was effectively recommended by a vote of the tenured faculty. The Board noted that the faculty in this case, unlike the faculty in *Yeshiva,* did not have authority to make effective recommendations concerning termination, since faculty members had been terminated and the dean had been reinstated despite negative faculty votes to the contrary. Nevertheless, the Board did not find this determinative, given that the faculty's authority in other areas was similar to that in *Yeshiva.*

N.Y. Medical College[29] concerned a petition to represent all the professional employees of the employer, which operated a medical school, a graduate school, a Mental Retardation Institution, and a Center for Comprehensive Health Practice, and which also was affiliated with and provided staff for four hospitals in Westchester County, New York, and in New York City. Contrary to the employer's contention, the Board panel determined that the professionals sought, who were predominantly faculty members, were not managerial employees, but employees for whom an election was properly directed.

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[28] 261 NLRB 587 (Chairman Van de Water and Members Fanning, Jenkins, Zimmerman, and Hunter).

[29] 263 NLRB 903 (Members Fanning, Jenkins, and Zimmerman).

The college was governed by the trustees, the president, who also monitors financial affairs, the financial officer, the dean, the associate deans, the department chairmen, and the chiefs of service. Its bylaws provided for a number of principal committees which dealt with significant aspects of governance as well as a Faculty Senate through which the faculty was to have a role in decisionmaking. However, although the Faculty Senate's Steering Committee, 10 of whose 14 members were elected by the faculty, was empowered to "advise and agree" with the dean in faculty committee appointments, the panel found that the dean did not seek its advice. Further, while the Steering Committee was also part of the Executive Faculty, which under the bylaws was charged to review all policy matters and make recommendations concerning appointments, the majority of the Executive Faculty were associate deans, department chairmen, and chiefs of service whom the parties acknowledged were managerial or supervisory and who were in a position to dominate decisions. The Board found that the dean was responsible for the supervision of all departments, controlled their budgets, and had a determining role in the evaluation, salary, selection, and discharge of chairmen and associate deans. The chairmen were found to run their own departments as "fiefdoms," and while they may have consulted with faculty members, the chairmen determined the budgets, activities, teaching assignments, salaries, and space allocations of their respective departments, recruited faculty members, and appointed the chiefs of service.

The panel also noted that the dean appointed most of the members of the principal committees, which themselves consisted predominantly or substantially of such managerial professionals as associate deans, chairmen, and chiefs of service. Thus, the Education and Curriculum Committee, responsible for guidelines which the departments were expected to follow, consisted predominantly of managers and supervisors, all of whom were appointed by the dean. The Committee on Tenure, Appointments and Promotions (TAP) was limited to tenured faculty, but consisted predominantly of chairmen who recruited faculty for their own departments, and promoted them without action by TAP. Promotions to associate

nd full professor positions were approved first by the dean, then
y TAP, then by the Executive Faculty which, as noted above, was
ominated by managerial personnel—and finally by a committee of
ne trustees.

In case of department chairmen vacancies, search committees se-
cted by the dean recommended names of candidates to the dean
ho made his own investigation and selection. The record showed
at various search committees consisted substantially of acknowl-
dged supervisors and or managers.

The bylaws also provided for a Grievance Committee composed
ntirely of faculty, excluding chairmen, but this committee had
rocessed only two grievances in 5 years and the administration
ad rejected the committee's decision in one of the cases. The dean
so appointed 50 to 60 faculty members to the Student Admissions
ommittee, but the Board panel found that the admissions deci-
ons were basically made by an Executive Admissions Committee,
ppointed by the dean and composed predominantly of managers
nd supervisors. Grading standards were developed by a committee
six faculty and two students, but were approved by the Execu-
ve Faculty. Promotion decisions on individual students were made
committees composed in practice of chairmen. While individual
rofessors graded their students in courses, the panel found this
thority insufficient to establish managerial status.

Accordingly, the panel concluded that the professionals in ques-
on were not managerial employees, under *Yeshiva* criteria, as the
vernance of the college rested with the board of trustees, the top
ficers, and the acknowledged managerial employees and/or statu-
ry supervisors; namely, the president, the dean, the associate
ans, and the department chairmen.

In *Florida Memorial College,*[30] the employer filed a petition to
arify a bargaining unit to exclude all faculty members on the
ound that they were managerial employees under *Yeshiva.* The
oard majority rejected the employer's position. The employer op-
ated a 4-year undergraduate college with about 36 full-time facul-
. Comparing the powers of the faculty to those in *Yeshiva,* the
ajority concluded that "in some significant areas this faculty pos-
sses no authority, and in others it possesses only a limited degree
influence. In no area does it exercise the absolute authority of
e *Yeshiva* faculty." While the employer pointed to faculty partici-
tion in various standing committees as evidence of managerial
thority, the majority found that these committees had little au-
ority, did not meet regularly, were not comprised solely of facul-

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[0] 263 NLRB 1248 (Members Fanning, Jenkins, and Zimmerman; Chairman Van de Water and
mber Hunter dissenting).

ty, and were not fully staffed. The Academic Council, which included 6 division chairpersons among its 11 members, was found to discuss various policy issues but, the Board majority concluded, there was no showing that it generally made operative decisions. Rather, such decisions were deferred to the president's cabinet, made up solely of administrators appointed by the president. Faculty chairpersons were also appointed by the president without faculty input, and faculty, other than chairpersons, had no formal role in academic governance, except through advisory committees, whose recommendations were not shown to be effective. The majority rejected the contention that faculty members had initiated new courses, finding that, while individual faculty members had suggested certain courses which were instituted, faculty approval or discussion had not been central to institution of new courses. A dean determined teaching loads, and the faculty had no effective control of admission or matriculation standards. While teaching methods and course content were determined for the most part by individual faculty members, "even this basic academic function" was subject to the "collaboration" of a dean in selecting textbooks

With respect to nonacademic matters such as hiring and tenure, the faculty was without any substantial authority. The president and his cabinet had complete discretion whether to form a search committee to fill a faculty vacancy. Search committees that were formed included faculty and administrators, but then some of their recommendations were rejected by the president. The college had no tenure provisions; the president had discretion whether to renew faculty contracts from year to year, and had sometimes rejected the chairpersons' recommendations in this respect. Faculty contracts provided that failure to obey rules prescribed by the president would be grounds for termination. The majority noted that the single grant of a sabbatical in evidence was approved without faculty input. Faculty grievances were taken to the chairpersons and thereafter through the administrative hierarchy. The division chairpersons, selected by the president, had some role in granting faculty raises, but only within narrow limits set by the administration; and their recommendations for faculty promotions were not shown to be effective. The president's cabinet drew up the budget without any significant role for chairpersons or other faculty, and changes in business practices affecting the faculty, such as travel reimbursement rules, were implemented unilaterally by the administration. The administration also decided to open two satellite campuses without consulting the faculty.

The Board majority noted testimony that the administration's decisions were made only after consultation with the faculty, but concluded that "[m]ere consultation with the faculty, even if this vague terminology is given the strongest possible reading in light of the record as a whole, does not give the faculty effective control in formulating management policies."

Chairman Van de Water and Member Hunter dissented, finding that "essential functions of the institution . . . [were] within the unquestioned province of the faculty." As examples they pointed to teaching methods, course content, student evaluations, course scheduling, and the assignment of instructors to courses. Also, they argued, division faculties had acted independently to institute language and reading laboratories, a peer tutoring program and other academic improvement programs, and in-service workshops. The dissenters also pointed to divisional faculty meetings which addressed such topics as the academic calendar, course schedules, and faculty evaluations and which informed the divisional chairpersons of faculty views that could then be conveyed to the Academic Council. The faculty had participated in search committees whose recommendations led to hiring of faculty and administrators. They also found the functions of the various standing committees on which faculty served to be "virtually paradigms of managerial authority." The dissenters disagreed that this "extensive faculty involvement in the management of the College . . . constitute[d] mere consultation," arguing instead that it was "effective discretion," and concluded that "[t]he fact that the administration retains *ultimate* authority fails to remove this case from the *Yeshiva* rationale." Accordingly, they found that the faculty met the *Yeshiva* test for managerial employees.

The Board also applied the *Yeshiva* standards to a health care facility in *Montefiore Hospital & Medical Center,*[31] where the employer argued that its doctors—staff physicians and dentists—sought to be represented by the petitioner, were managerial. Holding that "managerial status may not be based on decisionmaking which is part of the routine discharge of professional duties," the Board rejected the employer's contentions that managerial status was established by the doctors' participation in departmental operations, committees, and training of residents, or their employment on the faculty of a medical college.

The Board found that the Medical Center was governed by a highly centralized administrative structure, in which the director and five deputy directors made all policy and exercised ultimate control of financial and administrative matters, including labor relations and wage policies. Institutionwide policies were found to pervade the employer's operations, limiting managerial autonomy within each department. To the extent that decisions were made at the departmental level, the Board found that the department chairmen made them, with input of staff doctors limited to recommendations which the chairmen or the designees evaluated, in contrast to *Yeshiva*, where the Supreme Court relied on the collegial nature of the management of the institution, with the real authority to make fundamental decisions of managerial policy vested in the faculty as a group.

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[31] 261 NLRB 569 (Chairman Van de Water and Members Fanning, Jenkins, and Zimmerman).

While search committees were often involved in screening candidates for hire, the chairmen made the final selection. Medical procedures and policies were discussed and adopted at staff meetings, but these were found to be guidelines, rather than management directives, subject to the discretion of individual doctors. Although there had been staff recommendations for the purchase of new equipment, and one department had decided to encourage affiliation with another hospital, the Board found that these matters, while closer to the core of the employer's operations, did "not necessarily fall outside the professional duties primarily incident to patient care." Moreover, it also found that there was insufficient evidence to attribute such activities to either the entire staff or to specific individuals.

The Board also rejected the employer's contention that the doctors were managerial employees because of their appointment as members of the Albert Einstein College of Medicine and their asserted collegial participation in the formulation and implementation of "medical policy," noting that the doctors' primary concern was with patient care rather than with academic matters. It pointed to an important factor distinguishing the position of the doctors as faculty members from faculty members in *Yeshiva*, where the faculty members were full-time teaching personnel whose collegial authority with respect to academic matters was deemed to be closely related to the "business" of the university. It also noted that their academic functions—such as interviewing prospective interns and residents, evaluating their performance, and participating in the formulation of curriculum—were "not necessarily managerial." Accordingly, the Board concluded that it could not find, on the facts, that the doctors' alleged managerial participation so aligned the staff doctors with management or placed them sufficiently within the managerial structure so as to warrant their exclusion from the protection of the Act.

C. Bars to Conduct of an Election

In certain circumstances the Board, in the interest of promoting the stability of labor relations, will find that circumstances appropriately preclude the raising of a question concerning representation.

One such circumstance occurs under the Board's contract-bar rules. Under these rules, a present election among employees currently covered by a valid collective-bargaining agreement may, with certain exceptions, be barred by an outstanding contract. Generally, these rules require that, to operate as a bar the contract must be in writing, properly executed, and binding on the parties; it must be of definite duration and effective for no more than 3 years; and it must also contain substantive terms and conditions of employment which in turn must be consistent with the policies of the Act. Established Board policy requires that to serve as a bar to an election a contract must be signed by all parties before the rival petition is filed.

In the report year, the Board decided two cases involving contract bar. In *Crompton Co.,*[32] as the collective-bargaining agreement was set to expire on December 1, the contracting parties, on November 25, executed an agreement extending the contract until February 1 or until the execution of a new agreement which would supersede the extension. On December 2, the contracting parties reached an oral agreement on a new contract, but they did not execute it until December 18. Meanwhile, on December 11, the petitioner filed a petition seeking to represent employees of the contracting employer. The Board found the petition was timely filed, rejecting the contention of the contracting employer and certified union intervenor that either the extension agreement or the new contract barred the petition.

The Board agreed with the acting regional director that the extension agreement was of an indefinite duration, and therefore could not bar the rival petition herein. They found in accord with precedent [33] that when an extension agreement is qualified by a condition subsequent, as in the instant case, there is no fixed term so that those wishing to file representation petitions are not apprised when the open period—the period during which petitions may be timely filed—occurs. Such contracts of indefinite duration are ineffective as bars to petitions.

The Board stated further that, even if the extension agreement were for a definite duration, until February 1, it still would not bar the petition herein because it would be for a term of less than 90 days and would not serve the objectives of the Board's contract-bar rules. One such objective is for a collective-bargaining agreement to have a fixed term on its face so that anyone can immediately ascertain when the open period begins and when a representation petition may be appropriately filed. Thus, the contract bar rules provide for the open period, 60 to 90 days before expiration of the existing contract, during which it would not act as a bar. However, thereafter, to enable the parties to reach a new agreement, the final 60 days is an "insulated period" during which the contract bars peteitions. The Board stated that these contract bar rules further industrial peace and stability by assuring no labor relations disruptions during the term of the contract and by providing the parties with a period, just before contract expiration, to negotiate a new agreement free from such disruptions. At the same time, the rules provide an opportunity for disenchanted employees to seek the removal or replacement of its bargaining representative with another representative. Judged by these objectives, the Board concluded that agreements of less than 90 days, even if for a definite period, will not bar a petition because they provided little in the way of industrial stability and because they provide either an abbreviated period or no period during which employees may act to remove a bargaining representative.

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[32] 260 NLRB 417 (Chairman Van de Water and Members Fanning, Zimmerman, and Hunter; Member Jenkins concurring).

[33] *Frye & Smith*, 151 NLRB 49 (1965).

Member Jenkins, concurring, stated that he would simply deny review of the acting regional director's decision, and therefore did not subscribe to the Board's decision herein.

Shen-Valley Meat Packers,[34] involved a long-term contract of 5 years' duration, which provided for three wage reopeners at 6-month intervals, and, after 2 years, for a reopener for "the wage rate and other conditions of this agreement." The employer and union intervenor renegotiated wages pursuant to the reopeners and, after 2 years, negotiated and signed an amendment changing various provisions of the original contract, and providing for another 6-month wage reopener. The amendment was to be effective, by its own terms, "through the remainder of the agreement. After 6 months, the parties renegotiated wages and provided for another 6-month wage reopener.

The regional director had found that a petition filed after the third year of the contract was timely and not barred because, under *General Cable Corp.*[35] a contract of more than 3 years' duration is treated for contract-bar purposes as expiring on its third anniversary date. Although agreeing that the contract would ordinarily operate as a bar only for the first 3 years of its term, the Board panel found that the amendment of the parties had reaffirmed their original agreement for the remainder of its term and that the amendment barred the petition. In reaching this conclusion, the panel referred to *Southwesten Portland Cement Co.,*[36] where the Board had held that the parties to a long-term agreement could reactivate the contract bar, after the initial term of reasonable duration had passed by executing a new contract or a written amendment which expressly reaffirmed the long-term agreement. In *Southwestern,* the Board noted that, if such an amendment were executed prior to the 60-day insulated period during the period of reasonable duration (at that time 2 years), it would be subject to the "premature extension" doctrine.[37] The panel here found, contrary to the regional director, that the amendment was, in effect, a "premature extension" of the original agreement for a fixed term "effective through the remainder of the agreement" and that it expressly reaffirmed that long-term agreement.[38] Further, the panel pointed out that the parties' intent to reaffirm their original agreement could be inferred from references to the original agreement in the amendment and from the general scope of the earlier wage reopener which allowed the parties to renegotiate wages "and other conditions" and under which the parties did so in the amendment. Finally, stating that its interpretation of the amendment comported with the dual purpose of the 3-year reasonable duration rule: to promote stable collective-bargaining relationships, while preserving the right of employees to change their bargaining relationship, the panel concluded that the amendment properly served as a bar to rival petitions where, as here, the statutory policy favoring stability in collective bargaining was stronger, relative to the competing policy of employee free choice, since the bargaining relationship was active and the collective-bargaining agreement more nearly reflected contemporaneous conditions as the contracting parties perceive them.

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[34] 261 NLRB 958 (Members Fanning, Jenkins, and Zimmerman).
[35] 139 NLRB 1123, 1125 (1962).

D. Conduct of Election

Section 9(c)(1) of the Act provides that where a question concerning representation is found to exist pursuant to the filing of a petition, the Board shall resolve it through a secret ballot election. The election details are left to the Board. Such matters as voting eligibility, timing of elections, and standards of election conduct are subject to rules laid down by the Board in its Rules and Regulations and in its decisions. Elections are conducted in accordance with strict standards designed to insure that the participating employees have an opportunity to register a free and untrammeled choice in the selection of a bargaining representative. Any party to an election who believes that the standards have not been met may file timely objections to the election with the regional director under whose supervision it was held. The regional director may either make an administrative investigation of the objections or hold a formal hearing to develop a record as the basis for a decision, as the situation warrants. If the election was held pursuant to a consent election agreement authorizing a determination by the regional director, he will then issue a final decision.[39] If the election was held pursuant to a consent agreement authorizing a determination by the Board, the regional director will issue a report on objections which is subject to exceptions by the parties and decision by the Board.[40] However, if the election was originally directed by the Board,[41] the regional director may either (1) make a report on the objections, subject to exceptions, with the decision to be made by the Board, or (2) issue a decision, which is then subject to limited review by the Board.[42]

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[36] 126 NLRB 931 (1960).

[37] That doctrine holds that where parties renew their contract before the 60-day insulated period, a petition will still be timely if filed in the "open" period relative to the original expiration date of the contract. *Deluxe Metal Furniture,* 121 NLRB 995, 1001 (1958).

[38] The panel noted that the Board has defined a "premature extension" in *Deluxe, supra,* as a new contract or amendment executed during the term of an existing contract containing "a later terminal date than the existing agreement," but stated that that definition did not refer specifically to long-term contracts. It found that its use of the term "premature extension" was consistent with its use in *Southwestern Portland Cement Co., supra,* which dealt with long-term contracts.

1. *Excelsior* List Requirement

The Board's decision in *Excelsior Underwear*[43] established the voter eligibility list rule, by requiring that, within 7 days after the regional director approves a consent election agreement of the parties or after the regional director or Board has directed an election, the employer must file with the regional director an eligibility list containing the names and addresses of all eligible voters. The list is known as the *Excelsior* list. The regional director, in turn, is required to make this information available to all parties to the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. In this report year, the Board decided two cases involving alleged noncompliance with the *Excelsior* requirement.

In *Avon Products,*[44] the Board considered whether the union was prejudiced in its election campaign because it received an *Excelsior* list which had been rendered deficient by the subsequent Board decision on review broadening the scope of the appropriate unit. The employer had timely filed the list of all employees in the unit found appropriate by the regional director, and had also filed a request for review with the Board, contending that about 300 employees, excluded by the regional director, should have been included in the bargaining unit. The day before the election, the Board granted the employer's request for review, but imposed no additional *Excelsior* requirements on the employer with respect to the disputed employees. The union did not request a suppplemental voter list or a postponement of the election. The disputed employees cast challenged ballots. Subsequently, the Board issued its decision on review finding that approximately 292 employees had been erroneously excluded from the bargaining unit by the regional director, and overruling the challenges to those ballots. Having lost the election, the union filed objections contending that the election should be set aside because those 292 employees were not included in the *Excelsior* list.

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[39] Rules and Regulations, sec. 102.62(a).
[40] Rules and Regulations, sec. 102.62(b) and 102.69(c).
[41] Rules and Regulations, sec. 102.62 and 102.67.
[42] Rules and Regulations, sec. 102.69(c) and (a).
[43] 156 NLRB 1236, 1239–40 (1966).
[44] 262 NLRB 46 (Members Fanning and Zimmerman; Chairman Van de Water dissenting).

The regional director overruled the union's objections, finding that the employer had fully complied with the direction of election, and that the Board had not imposed any additional *Excelsior* requirements. He pointed out that as the request for review was granted the day before the election, the employer would probably not have been able to produce a list, nor would the union have been able to use it, if produced. Furthermore, noting that the union had stated at the representation hearing that it would not participate in an election in any unit broader than that which it had sought, he reasoned that when the Board granted the employer's request for review, the union was on notice that the Board might find the broader unit appropriate, and thus the burden was on the union to request that the election be postponed and that a supplemental list be provided. Accordingly, the regional director concluded that it would be improper to allow the union to rely on its own inaction as a ground to set aside the election.

In reversing the regional director, the Board panel majority disagreed with the regional director that the union bore the responsibility for not having received a complete list of eligible voters. Rather, they stated that the error of procedural oversight was the Board's, and that the Board was required to rectify its error. They found that "[t]he disparity between the size of the unit in which the election was directed and the unit sought on review necessarily raised the *Excelsior* issue and should have led the Board . . . to order a stay of the election" and that "[i]n a situation such as this, the onus is not on either the Union to seek, or the Employer to compile, a list of all potential voters. Rather, the responsibility is the Board's to effectuate the policies expounded in *Excelsior* by staying the election until the unit has been determined."

The majority also explained that whether its "procedural oversight" warranted setting aside the election depended not on the degree of employer fault, but on the degree of prejudice to the channels of communication which the *Excelsior* policy was designed to enhance. In this case, where nearly a quarter of the voters in the unit ultimately found appropriate were not on the *Excelsior* list, the panel majority found that the union had suffered substantial prejudice, and that the election must be set aside.

Chairman Van de Water dissented, agreeing with the regional director that the burden was on the union to seek a postponement of the election. Pointing to the union's statement at the hearing that it did not wish to participate in an election in a unit broader than it had requested, he maintained that "[i]f there was any 'procedural oversight,' it was the Board's ordering the tally of the challenged ballots" despite the union's statement. In any event, the Chairman argued that the union was not prejudiced because its margin of defeat in the election was greater than the 292 votes added to the unit by the Board's decision on review so that the 292 additional votes, even assuming, *arguendo,* that they were unanimously for the union, *could not* have affected the election results.

Noting the "unfortunate delay" in deciding the instant case, Chairman Van de Water suggested that in any future decision granting review where a unit is expanded on review, the union be explicitly informed of its options to: (a) seek postponement of the election and have the right to an updated *Excelsior* list, or (b) to proceed to election, waiving any *Excelsior* objection based on the unit expansion, or (c) withdraw from the election in the unit broader than that sought.

In *Red Carpet Bldg. Maintenance Corp.,*[45] the Board panel overruled the petitioning union's objection where the union had received the *Excelsior* list only 6 days before the election, finding that the delay did not prejudice materially the union's ability to communicate with employees. The parties had entered into a consent election agreement on April 1, scheduling the election for April 23. The regional director approved the agreement on April 7 and informed the employer that the *Excelsior* list was due April 14. On April 14, the employer filed the list with the region which mailed it to the union on April 15. When the union had not received the list by April 16, it asked the region to send the list by express mail, which the region did. The union received the later mailed list on April 17 and the region's other list on April 19.

The regional director, concluding that the union's late receipt was attributable to the Board's own error and late mail service and that the Board was not in substantial compliance with the *Excelsior* rule, recommended that the election results be set aside. The panel disagreed, deciding that any delay in the union's receipt of the eligibility list did not frustrate the purposes which the *Excelsior* rule was intended to achieve. It reasoned that the union, in agreeing to an early election, "presumably chose to maximize the impact among employees of its prior organizing activities . . . [in so doing,] sacrificed the opportunity for prolonged utilization of the *Excelsior* list." The panel observed that the union "reasonably could not have anticipated postal delivery of the list before April 16, at the earliest" and that, nonetheless, it made no special arrangements for expediting its receipt of the list until 1-day before it ultimately received the list and at no time did the union request that the election be postponed because of the late receipt of the list. Moreover, the union had the list for 6 days in a unit of about 60 employees, and in fact had time to mail notices of two preelection meetings to the employees. Accordingly, the panel found no basis for concluding that the union was prejudiced by this minor 1-day delay in the receipt of the list.

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[45] 263 NLRB 1285 (Chairman Van de Water and Members Fanning and Hunter).

The panel distinguished this case from others upon which the regional director relied where the Board had set elections aside based on late receipt of *Excelsior* lists caused by Board error and postal delay because the delay was more substantial in those cases.[46]

2. Eligibility To Vote

The results of an election may depend on the voting eligibility of individual employees whose right to vote has been challenged by one of the parties or the Board agent. If challenged employees' votes would affect the result of the election, the Board will determine their eligibility and either count or reject their votes as appropriate. Similarly, in determining the appropriate unit the Board will either include or exclude an individual whose unit placement is disputed.

In *Stevens Ready-Mix Concrete Corp.*,[47] decided in this report year, the Board majority adopted a hearing officer's report finding eligible to vote seven sympathy strikers who had been on strike for less than 12 months. The strikers had refused to cross the lawful picket line established by other employees of their employer, despite the employer's assertion to them that they were in violation of the no-strike clause in the contract covering them. The majority agreed with the hearing officer that the collective-bargaining

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[46] Distinguishing *American Laundry Machinery Div., McGraw-Edison Co.*, 234 NLRB 630 (1978), and *Coca-Cola Co. Foods Div.*, 202 NLRB 910 (1973).

[47] 263 NLRB 1280 (Members Fanning, Jenkins, and Zimmerman; Chairman Van de Water and Member Hunter dissenting).

agreement contained a no-strike clause which did not refe
cally to prohibition of sympathy strikes, and with his co
that the extrinsic evidence from earlier negotiations did n
lish clearly that the parties intended in their contract
sympathy strikes. Thus, they agreed with the regional dire
liance on the Board decision in *Davis-McKee*[48] and *Gary-I*
in finding that the employees' rights to engage in such a s
strike had not been clearly and unmistakeably waived.

Further, the Board majority disagreed with their dissen
leagues who stated that the employer had lawfully termin
sympathy strikers for breach of the contract's no-strik
pointing out that there was no evidence that the emplo
been terminated and that the employer had argued that
ployees had quit. Accordingly, they did not "see the rele
any discussion concerning the justification for such actio
the contract."

Chairman Van de Water and Member Hunter dissenti
greed with the majority's position on interpretation of
clauses. Rather, they stated that they were in accord
views expressed by former Member Penello in his concurr
ion in *Davis-McKee, supra,* in which he concluded that w
ties embody in a contract "a clause stating essentially t
shall be no strikes during the term of an agreement, it me
there shall be no strikes during the term of the agreement
extrinsic evidence indicates that the parties intended ot
They argued that it was "illogical to find that a union can
waive employees' rights to strike . . . against their own
and then argue that a lesser right, the right to engage in
thy strike involving another employer, is not encompasse
clause."

Futhermore, the dissenters argued that the employees
lawfully terminated pursuant to the no-strike clause of t
tive-bargaining agreement, and thus were not eligible to
dissent would have found that the employees were termi
cause the employer sent them telegrams "advising them
were in violation of the no-strike clause . . . and requesti
to return to work under threat of permanent replaceme
subsequently hired replacements for the employees wh
time of the election, had been on strike for more than 9
Accordingly, they would have found the seven sympathy
were lawfully terminated and therefore ineligible to vot
election.

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[48] *Intl. Union of Operating Engineers, Loc. 18 (Davis-McKee),* 238 NLRB 652 (1978)

[49] *Gary-Hobart Water Corp.,* 210 NLRB 742 (1974).

3. Ballot Markings

Section 9(C)(1) of the Act requires all Board elections to be conducted by secret ballot. The Board through its entire history has gone to great lengths to establish and maintain the highest standards possible to avoid any taint of the balloting processes.

In *Hydro Conduit Corp.*,[50] the acting regional director found that a ballot left blank on the front side, but with the word "si" written on the back should not have counted as a valid vote for the petitioning union. In so doing, he relied on existing Board policy, enunciated in *Columbus Nursing Home*,[51] of invalidating ballots marked only on the back on the ground that "any conclusion drawn about the voter's intent based on markings on the back of that ballot must be almost entirely speculative."

Noting the refusal of several courts of appeals to accept this Board policy and the refusal of the Supreme Court to grant certiorari and render a decision on the issue,[52] the Board decided to reevaluate its position. Upon reevaluation, the Board majority acknowledged, in agreement with the courts, that it was inconsistent to consider voter intent if clearly, although irregularly, manifested on the front of a ballot, and yet not to consider a clear demonstration of voter intent if expressed on the reverse side of a ballot. Therefore, in keeping with longstanding policy of attempting to give effect to voter intent whenever possible, the majority stated that it would hereafter count any unambiguous expression of voter intent as expressed on the ballot and overruled any doctrine to the contrary expressed in *Columbus Nursing Home* or in other cases. Since the election involved only one union, and the ballot presented a single yes or no choice and since the word "si" written on the back of the ballot unmistakably indicated that the Spanish-speaking employee wished to be represented by the union, the Board majority found the ballot was valid and should be counted as a vote for the union.

Member Fanning, concurring and dissenting, agreed with the majority that the Board should always attempt to give the fullest effect to voter intent, but argued that the counting of improperly marked ballots opens the door to speculation and subjective interpretation of voter intent and has the potential of destroying the secrecy of representation elections. Member Fanning advocated the formulation of a rule, through the Board's rulemaking procedures, invalidating any ballot not marked in accordance with the clear and explicit instructions provided on the ballot. He argued that this rule, which he believed the courts would honor, would "permit every voter to cast a clear vote, expedite the finalization of elections, and avoid the unnecessary use of time and money to guess at what a voter might—or might not—have intended."

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[50] 260 NLRB 1352 (Chairman Van de Water and Members Zimmerman and Hunter; Member Fanning concurring and dissenting; Member Jenkins dissenting).

[51] 188 NLRB 825 (1971).

[52] *N.L.R.B.* v. *Manhattan Corp., Manhattan Guest House*, 452 U.S. 916 (1981).

Member Jenkins dissented, stating that, for the reasons set forth in *Columbus Nursing Home*, he would adhere to the policy enunciated therein and would invalidate ballots marked solely on the back.

The Board subsequently applied the *Hydro Conduit* rule in *Missoula Textile Services*,[53] and *Mallin Bros. Co.*[54] In both cases a panel majority ruled that a ballot blank on its face, but with the word "No" written on its back, should be counted as a vote against union representation. In *Missoula Textile Services*, Member Fanning stated that he would apply *Hydro Conduit* even though he believed that the rule he proposed in that case would be the most efficient and cost-effective means of disposing of improperly marked ballots.

In both cases, Member Jenkins dissented for the reasons expressed in his dissent in *Hydro Conduit*, and stated that he would adhere to the Board's longstanding policy of invalidating ballots marked solely on the reverse side of the ballot.

In *Kaufman's Bakery*,[55] the Board considered the validity of ballots containing an "X" and additional marks in the "Yes" box, and no marks in the "No" box or elsewhere on the ballot. Examining the ballots in light of the majority opinion in *San Joaquin* [56] the regional director determined that the ballots did not contain the type of random stray marks that led the Board in *San Joaquin* to validate the ballot as an inadequate manifestation of voter intent, and concluded that the voters were attempting to emphasize "Yes" votes with additional markings. While agreeing with the regional director's ultimate conclusion to count the disputed ballots as valid "Yes" votes, the Board majority disagreed with his analysis. Rather, in keeping with the Board's long-established policy of attempting to give effect to voter intent wherever possible, they announced that the Board would "hereafter regard a mark in only one box, despite some irregularity, as presumptively a clear indication of the intent of the voter." To the extent that this view was inconsistent with the majority opinion in *San Joaquin*, that desicion was overruled.

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[53] 261 NLRB 816 (Members Fanning and Zimmerman; Member Jenkins dissenting).

[54] 261 NLRB 1009 (Chairman Van de Water and Member Hunter; Member Jenkins, dissenting).

[55] 264 NLRB 225 (Chairman Van de Water and Members Jenkins, Zimmerman, and Hunter; Member Fanning dissenting in part).

[56] *San Joaquin Compress & Warehouse Co.*, 251 NLRB 23 (1980) (Member Jenkins dissenting).

In concluding that the ballots in question were valid, the Board
majority noted that the voters substantially complied with the
ballot instructions with no suggestion from the configurations
within the "Yes" boxes that the voters used their markings for
dentification purposes, and that the irregularly marked ballots in-
licated with reasonable certainty the employees' intent to vote for
he union. Noting the clear ballot instructions that "[i]f you spoil
his ballot return it to the Board Agent for a new one," the major-
ty rejected as unlikely the "premise" of the dissent, and of *San*
oaquin, "that, by drawing irregular marks over his original 'X' a
oter may be attempting to cancel his initial selection and cast a
o-choice' vote." They noted further that to invalidate a ballot
henever there was the slightest variance from the normal
anner of ballot marking would result in the unnecessary disen-
anchisement of many voters.

Member Fanning dissented in part, arguing that in this case the
tent of the voters was "open to at least two reasonable competing
terpretations": the irregular markings might have been intended
emphasize their votes or to obliterate the original markings and
ereby cast no-choice ballots. To interpret the ballots one way or
e other, Member Fanning argued "would be based on an unwar-
nted degree of speculation." As in *Hydro Conduit,* Member Fan-
ng advocated that, pursuant to the Board's rulemaking proce-
res, it should adopt a rule invalidating any ballots that, as those
re, are not properly marked according to the instructions on the
lots.

n *Medical Center of Beaver County,*[57] the hearing officer in a
resentation proceeding recommended that the Board overrule
employer's objection which alleged that the petitioning union
nly maintained, during the election, a tally or list of eligible
ers in order to pressure and influence employees in casting their
ots. He found that, although union adherents did maintain
a list, only one voter was shown to have seen it, and, there-
, the union's conduct was *de minimis.* The panel majority
oted the hearing officer's findings and recommendations, and
cted as unwarranted the dissent's inference that knowledge of
list was more widespread. In so doing, the majority noted testi-
y that the two union adherents kept the list, which was on a
oard, hidden from sight when employees passed by, and that
would not check off an employee's name until the employee
entered the building to vote. While the dissent relied on the
mony of two non-unit witnesses, who testified to having seen
ist, in inferring that voters, other than the one referred to by

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1 NLRB 678 (Chairman Van de Water and Member Jenkins; Member Hunter dissenting).

the hearing officer, must also have seen it, the majority noted that one of these witnesses testified that the union adherent hid the list under her coat. Thus, the majority found it to be clear that the list was not maintained "openly," and that the evidence was inadequate to support the inference that more than one employee saw the list. Considering that the voting unit numbered approximately 315 employees, the panel majority agreed with the hearing officer that the union's conduct was *de minimis* and did not warrant setting aside the election.

In dissenting, Member Hunter stated that the hearing officer found that the union agents and representatives had openly kept and used a tally or lists of eligible voters, but erroneously concluded that the list-keeping was *de minimis* based on the narrow ground that only one unit employee was shown to have known of the list's maintenance and use. In light of the hearing officer's findings, Member Hunter was of the view that an inference that knowledge of such a list was much more widespread was mandated. He pointed out that the hearing officer, in essence, credited at least three witnesses who indicated that the two union adherents at the employees' entrance during the voting period openly displayed and used the voting list and that there was other testimony that one of the adherents asked whether one of the voting employees was "one of ours" and that the other adherent was seen marking the clipboard as individuals went through the entrance. It thus appeared to Member Hunter that the hearing officer concluded that only *direct* testimony of bargaining unit employees who had actually seen the list could be considered and relied on and that in doing so he erred because the Board had clearly indicated that employee knowledge that their names were being recorded may be "affirmatively shown or . . . inferred from the circumstances." Accordingly, Member Hunter would have found, from compelling circumstantial evidence, that many bargaining unit employees had to have been aware of the list-keeping.

E. Service of Objections to the Election[58]

In *Glesby Wholesale,*[59] the employer failed to attach a proof of service form to the election objections it filed with the Board's region and thereby failed to comply with the requirement in section 102.69 of the Board's Rules and Regulations that it immediate-

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[58] Sec. 102.69(a) provides in pertinent part:

> Within 5 days after the tally of ballots has been furnished, any party may file with the regional director an original and three copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. . . . Copies of such objections shall immediately be served on the other parties by the party filing them, and a statement of service shall be made.

[59] 259 NLRB 54 (Members Fanning and Zimmerman; Member Jenkins dissenting).

ly serve the other party with a copy of the objections and make a
statement of such service. Finding that the employer had offered
no valid or compelling reason for its failure to comply, the acting
regional director recommended that the objections be dismissed. In
its exceptions to the Board, the employer conceded that it failed to
attach a "Proof of Service" form, but asserted that the failure was
due to "clerical inadvertence." It contended that when the objec-
ions were prepared, a proof of service form was attached, and that
t had a good-faith belief that the proof of service form was still at-
ached to the objections when they were filed with the region and
hat a copy of the objections were immediately served upon the pe-
itioner. The transmittal letter to the region stated, *inter alia,* that
copy of the objections were served "today . . . as more fully set
orth in the attached Proof of Service." The employer also asserted
hat, upon learning of its failure to comply with the service re-
uirements of section 102.69, it immediately sought to rectify the
rror by serving, the next day, a copy of the objections on the peti-
oner and a new proof of service with the region. Accordingly, the
mployer argued that the acting regional director had erred in fail-
g to find that it had made "an honest attempt to comply" with
ction 102.69. The Board found that these facts established that
e employer had made "an honest attempt to substantially
mply" with the Board's Rules on service of objections, concluding
at the transmittal letter and the speed with which the employer
ught to perfect service upon learning of the deficiencies in serv-
e indicated that the failure to comply was due to clerical inadver-
nce rather than to a disregard of the Board's requirements.

Member Jenkins, in dissent, disagreed with the conclusion that
e facts established that the employer had made "an honest at-
mpt to substantially comply" with the Board's Rules, since the
nployer was admittedly aware of the service requirements, and
t was not sufficiently concerned to prevent such "clerical inad-
rtence" as occurred. This lack of concern, he argued, clearly dem-
strated a disregard of the Board's requirements rather than an
onest attempt" to substantially comply therewith. Since the em-
yer has established neither an "honest attempt to substantially
nply" with the Board's requirements nor a "valid and compel-
g reason" for its noncompliance, Member Jenkins concluded that
objections should be dismissed.

n *Theta Cable of Calif.,*[60] two locals of the petitioner had filed
l withdrawn petitions immediately before the petitioner filed
election petition upon which the election herein was conducted.
e employer timely filed objections with the regional office, and

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261 NLRB 1172 (Members Fanning and Jenkins; Member Hunter dissenting).

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mistakenly served a copy of the objections on one of the two locals rather than on the petitioner which advised the regional office that it had not been served. Immediately upon being informed by the region of this deficiency, the employer served a copy on the petitioner which was 10 days after the deadline for receipt and service of all objections.

The regional director's investigation also revealed that, the day before the objections were due, the employer's attorney had directed his secretary to type the objections the next day, have them reviewed, and serve them "on the Union." In preparing the proof of service and in serving the objections, the secretary concluded that she should serve one of the two locals because the firm's correspondence and pleadings material contained a copy of the petition earlier filed by that local, and that petition appeared to be the most recent petition relating to the employer. The file also contained an undated copy of the petitioner's petition, but did not contain the Board's dated and numbered copy of the instant petition which had been served on the employer by the region, or certain other documents pertaining to the instant proceeding.

Based on these facts, the regional director recommended that the objections be rejected on the ground that they were not served on the petitioner in compliance with section 102.69 of the Board's Rules and Regulations which requires, *inter alia,* immediate service on all necessary parties, although the error was deemed to be an "honest mistake." In its exceptions, the employer contended that an honest attempt was made to comply substantially with the requirement of the rules and that service was in fact made upon the petitioner as soon as the error in service was brought to its attention.

The panel majority noted that in *Auto Chevrolet,*[61] it had reaffirmed the principles enumerated in *Alfred Nickles Bakery,*[62] that in order to support a variance or deviation from the clear requirements of the rules, the objecting party must show "an honest attempt to substantially comply" with the Board's rules on the service of objections. In applying these principles herein, it first pointed out that the employer did timely file its objections on the party it thought to be the petitioner in this proceeding, and that error appears to have had its genesis in the contemporaneous withdrawal of the previous petitions by the locals and the filing of the instant petition by the Union. In these circumstances, the majority found that it could not say that this unusual occurrence could not have created some confusion for the attorney's secretary and that the secretary's error was due to clerical inadvertence rather than any disregard for the Board's Rules. Further, it also noted that once the regional director notified the employer that its attempted service had been unsuccessful, the employer took immediate steps to effectuate proper service on the petitioner.[63] Accordingly, the majority considered the employer's objections which, in agreement with the regional director, were overruled and the petitioner certified.

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[61] 249 NLRB 529 (1980).

[62] 209 NLRB 1058 (1974).

Member Hunter concurred in the result to certify the petitioner, but like the regional director found that the objections were untimely for failure of proper service. He argued that the *Auto Chevrolet* standard, applied by the majority in the instant case, was unworkable. Since the standard turns on such elusive concepts as "honest attempt" and "substantial compliance," he stated that the Board's experience showed that these concepts mean different things to different Board members, and all without regard to harmonizing the different results reached by panels in factually similar cases.

Member Hunter further argued that the validity of his criticism was illustrated by an examination of *Glesby Wholesale, supra*, where the employer also relied on "clerical inadvertence" to excuse noncompliance with the service requirements and where dissenting Member Jenkins pointed out that the result reached in *Glesby* was inconsistent with decisions following *Auto Chevrolet.*[64] Since the Board's putative adherence to *Auto Chevrolet*, coupled with its apparent willingness to abandon its application in practice, only leads to confusion, Member Hunter endorsed, as the most sensible route out of the morass, the proposal that the regional directors serve on all parties copies of objections which have been timely filed with the region, an approach already undertaken routinely for unfair labor practice charges and representation petitions.

In *Empire Moving & Storage,*[65] the petitioner timely filed objections to the election, but inadvertently did not include a statement of proof of service of the objections upon the employer. On the day the objections were due, the region acknowledged receipt of the objections and advised the petitioner that it was also required under section 102.69 of the Board's Rules and Regulations to make immediate service on the employer. The Union served the employer 3 calendar days and 1 working day later. Thereafter, the employer moved the regional director to dismiss the objections because of the untimely service and the regional director so recommended to the Board.

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[63] Member Fanning also relied on his separate statement in *High Standard*, 252 NLRB 403, 405, fn. 7 (1980), to the effect that, in spite of the failure to follow the service requirements or provide an explanation for not following those procedures, there might still be a basis for finding "an honest attempt to substantially comply" if immediate steps are taken to effectuate proper service once notice is given that the attempted method of service has been unsuccessful.

[64] Member Jenkins found *Glesby* to be plainly distinguishable. There, unlike the instant case, there was no attempt at service and, in his view, the employer there demonstrated a disregard of the Board's requirements rather than an honest attempt to comply substantially therewith. Member Jenkins asserted that, similarly, the other cases relied on by Member Hunter were factually irrelevant.

[65] 261 NLRB 1341 (Chairman Van de Water and Member Fanning; Member Hunter dissenting).

The Board panel majority first noted that its decision was governed by two considerations listed in *Alfred Nickles Bakery* [66] and reaffirmed in *Auto Chevrolet:* [67] "some showing that there had been an honest attempt to substantially comply with the requirements of the Rules, or alternatively a valid and compelling reason why compliance was not possible." However, it also noted that, as was also indicated in *Alfred Nickles, supra,* the Board should not adopt a slavish adherence to form rather than substance. Applying these two principles, the panel majority found that the objections were timely filed with the region; that there was no showing of bad faith or intent to delay the proceedings; that service, while 3 calendar days late, was only 1 business day late; and that union immediately served the employer upon being informed of its oversight in the matter. Further, the union served the objections prior to any motion to dismiss for untimely service by the employer. Accordingly, the objections were accepted.

Member Hunter, dissenting, noted his colleagues' failure to observe that the union did not offer any reason for its initial failure to comply with the service requirements and in fact, had admitted to the regional director that it had "inadvertently failed to [serve the employer] although it was aware that such service should be made contemporaneously with service to the Board." Further, he argued that, under current Board precedent, particularly *Auto Chevrolet, supra,* the facts relied on by the majority are irrelevant to a finding that there has been substantial compliance with the Board's rules, pointing out that the petitioner's ultimate service of the objections shortly after they were due was the result of alertness of the regional office rather than to any action by the petitioner. He argued that the decision points out anew the pitfalls in the *Auto Chevrolet* case-by-case approach to determining a party's "honest attempt" to "substantially comply" with the rules regarding the timeliness of objections. That approach has resulted in a myriad of decisions reaching different results of facts not significantly different from one another. Accordingly, he again proposed, as he had in *Theta Cable, supra,* that the Board revise its rules to require the regions to serve copies of timely objections of all necessary parties to the election proceeding. Absent such a rule,

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[66] 209 NLRB 1058, 1059 (1974).

[67] 249 NLRB 529 (1980).

Member Hunter stated that adherence to present Board precedent required finding that the objections were untimely because they were admittedly served after their due date and because no excuse was offered for that delay, other than mere inadvertence.

F. Objections to Conduct Affecting an Election

An election will be set aside and a new election directed if the election campaign was accompained by conduct which, in the Board's view, created an atmosphere of confusion of fear of reprisals or which interfered with the employees' exercise of their freedom of choice of a representative as guaranteed by the Act. In evaluating the interference resulting from specific conduct, the Board does not attempt to assess its actual effect on employees, but rather concerns itself with whether it is reasonable to conclude that the conduct tended to prevent the free formation and expression of the employees' choice. In making this evaluation, the Board treats each case on its facts, taking an *ad hoc* rather than a *per se* approach in resolution of the issues.

In the 1978 *General Knit* decision,[68] a Board majority overruled *Shopping Kart Food Market,*[69] and announced a return to the *Hollywood Ceramics*[70] standard for determining whether electioneering statements or propaganda required setting aside an election. Under that standard, "an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentations, whether deliberate or not, may reasonably be expected to have a significant impact upon the election."[71] This year, the Board reconsidered that rule in *Midland Natl. Life Ins. Co.*[72] In *Midland,* involving an election objection alleging misrepresentations, the Board majority overruled *General Knit* and *Hollywood Ceramics,* and returned to what they regarded as the sound rule, articulated in *Shopping Kart* which set forth a standard of review for alleged election misrepresentations. Under this rule, the Board will no longer probe into the truth or falsity of the parties' campaign statements and will not set elections aside on the basis of misleading campaign statements. Noting that the decision to return to *Shopping Kart* so soon after having overruled it was likely to cause concern, just as did *General Knit's* quick retreat from *Shopping Kart* in 1978, the majority stated that they did not take the step lightly. Rather, the majority reinstated the *Shopping Kart* standard because of their emphatic belief that the rule was the most appropriate accommodation of all the interests involved and should be given a fair chance to succeed. In the majority's opinion, this rule, unlike its predecessor, was a clear, realistic rule of easy application which lends itself to definite, predictable, and speedy results. It removes impediments to free speech by permitting parties to speak without fear that inadvertent errors will provide the basis for endless delay or overturned elections, and promotes uniformity in national labor policy by minimizing the basis for disagreement between the Board and the courts of appeals. Weighing the benefits flowing from reinstatement of the *Shopping Kart* rule against the possibility that some voters may be mislead by erroneous campaign propaganda, a result that even *Hollywood Ceramics* permits, the majority found that the balance unquestionably fell in favor of implementing the standard set forth in *Shopping Kart*.

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[68] *General Knit of Calif.*, 239 NLRB 619 (1978); 44 Ann. Rep. 73 (1979).

[69] 228 NLRB 1311 (1977).

[70] 140 NLRB 221 (1962).

[71] *Id.* at 224.

[72] 263 NLRB 127 (Chairman Van de Water and Members Zimmerman and Hunter; Members Fanning and Jenkins dissenting).

The majority also noted that the Board would continue to intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is,[73] and would set aside an election not because of the substance of the representation, but because of the deceptive manner in which it is made, a manner which rendered employees unable to evaluate the forgery for what it is. As was the case in *Shopping Kart*, the Board would continue to protect against other campaign conduct, such as threats, promises, or the like, which interferes with employee free choice.

Accordingly, as the union's objections alleged nothing more than misrepresentations, the Board majority overruled them and certified the results of the election.

Members Fanning and Jenkins, dissenting, argued that the Board majority had abandoned what they considered to be the flexible and balanced *Hollywood Ceramics* standard for determining when campaign misrepresentations had overstepped the bounds of tolerability, and substituted an ultrapermissive standard that places a premium on the well-timed use of deception, trickery, and fraud. The dissenters noted that the majority has reiterated the familiar theme of the "unrealistic view of the ability of voters to assess misleading campaign propaganda" (attributed to *Hollywood Ceramics*) and the promise of eliminating delays caused by the processing of misrepresentation objections. The dissenters argued that the policies behind *Hollywood Ceramics* belied the majority's claim that it was based on an over-protectionist condescending view of employees. Thus, they pointed out that the basic policy underlying the *Hollywood Ceramics* rule was to assure the employees full and complete freedom of choice in selecting a bargaining representative and that one of the factors which might so disturb the laboratory conditions and interfere with the employees' expressions of free choice was gross misrepresentation about some material issue in the election.

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[73] The majority also observed that, as stated in *Shopping Kart*, the Board would continue to set elections aside when an official Board document has been altered in such a way as to indicate an endorsement by the Board of a party to the election, citing *Allied Electric Products*, 109 NLRB 1270 (1954).

In the view of the dissenters, "the Board must balance the right of the employees to an untrammeled choice, and the right of the parties to wage a free and vigorous campaign with all the normal legitimate tools of electioneering," and yet the majority in the interest of possibly reducing litigation, a speculative theory at best, has given up any attempt to balance the rights of the employees and the campaigners.[74] Further, to the dissenters, the new rule would relinquish the Board's obligation to put some limits on fraud and deceit as campaign tools, and employee free choice would necessarily be inhibited, distorted, and frustrated by this new rule which creates an irrebuttable presumption that employees can recognize all misrepresentations, however opaque and deceptive, except forgeries. Absent some external restraint, in the dissenters' view, the campaigners will have little incentive to refrain from any last-minute deceptions that might work to their short-term advantage.

In *Riveredge Hospital,*[75] the Board majority, noting the earlier decision in *Midland, supra,* to return to the general rule in *Shopping Kart, supra,* determined that it was appropriate to reexamine the *Formco*[76] exception to *Shopping Kart.* In *Formco,* the Board relied on the analysis in *Dubie-Clark*[77] to find that a mischaracterization of a settlement agreement was objectionable because it potentially conveyed the impression that the Board favored one party in the election campaign over the other party, thus impairing the Board's neutrality. In *Dubie-Clark,* the Board had analogized such a misrepresentation of a Board action to the physical alteration of a Board document on the basis that any misuse of Board documents or the Board's processes for partisan advantage must be prohibited because this misrepresentation might place the

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[74] Further, the dissent pointed out figures showing that the number of elections in which misrepresentation allegations were ruled on increased during the first full year under *Shopping Kart,* despite a decrease in the total number of elections conducted in those respective years.

[75] *Affiliated Midwest Hospital, d/b/a Riveredge Hospital,* 264 NLRB 1094 (Chairman Van de Water and Members Zimmerman and Hunter; Members Fanning and Jenkins dissenting).

[76] *Formco,* 233 NLRB 61 (1977).

[77] *Dubie-Clark Co.,* 209 NLRB 217 (1974).

Board's neutrality in question. The majority in *Riveredge* was of the view that the equation of a party's physical alteration of a Board document with the misrepresentation of a settlement agreement was erroneous. The physical alteration involves the misuse of the Board's documents to secure an advantage, while the misrepresentation merely involves a party's allegation that the Board has taken an action against the other party and is essentially the same as any other misrepresentation. A finding in favor of or against a party in a proceeding does not indicate that the Board has taken any view with respect to the course the employees should take in an election campaign; otherwise, the Board arguably should preclude even truthful statements of Board actions in order to preserve its neutrality.

Further, the majority noted that where a party alters a Board document and proffers it as an official statement of Board action, it is the Board which purports to speak through the document. On the other hand, where a party misrepresents the Board's actions, the Board's actions speak for themselves, and will show up any misrepresentation for what it is. Consequently, seeing no sound reason why misrepresentations of Board actions should be on their face objectionable or be treated differently than other misrepresentation, the majority overruled *Formco* and found the union's leaflet stating that the Board had issued a complaint against the employer—a clear misstatement of the Board's action[78]—was found not to be objectionable.

Members Fanning and Jenkins, dissenting, characterized the majority's finding as condemning any misrepresentation of Board proceedings accomplished by the use of an altered Board document, but condoning the same misrepresentation when made on a separate sheet of paper in the form of a fraudulent misstatement of Board action. They asserted that such a distinction was the logical extention of the specious distinction between forgery and all other kinds of fraud, reasserted in *Midland, supra.* Thus, the dissenters noted that the majority gave only superficial consideration to the reasons for assuring truthfulness in reporting Board actions involving the parties competing for the employee's votes and gave but nodding attention to the discouraging effect on voluntary settlements, if parties are permitted to mischaracterize such settlements as official findings of unlawful conduct. Unions and employers would be more reluctant to enter into settlement agreements knowing that such agreements might provide another party with an incentive to publish with impunity the kind of unfounded and unfair statements about a settlement that were made in the instant case.

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[78] The unfair labor practice charge against the employer was settled with a nonadmission clause and no complaint had been issued.

In *Labor Services,*[79] the Board majority, in agreement with the regional director, overruled the employer's election objection. He had found that the union's business agent bought drinks for employees in a bar adjacent to the polling area before and during the hours the polls were open. The regional director noted that there was no evidence that (1) drinking, buying of drinks, or any statements about voting took place in the immediate area of the election; (2) any employees were inebriated before or during the election; (3) employees entered the bar other than totally of their own volition; (4) employees were given advance notice that coming to the bar would result in free drinks; (5) any coercive statements were made by any party; or (6) anything of any exceptional value was bestowed upon employees. Accordingly, and even assuming the accuracy of the employer's version of the incident, the regional director found, in accord with Board precedent,[80] that the business agent's conduct was not objectionable, and did not otherwise inhibit employees in the exercise of their free choice in the election, noting that the incident occurred outside the polling area and that the value of the drinks given to the employees was not sufficient to interfere with the employees' free choice at the election.

Chairman Van de Water and Member Zimmerman dissented, pointing out that the Board endeavors to maximize employees' freedom of choice, and that, in furtherance of that goal, it has proscribed, in *Milchem,*[81] certain last-minute electioneering between voters and parties to the election. While recognizing that the union's conduct did not fall within the four corners of the *Milchem* rule, the dissenters viewed the union's conduct as providing "the potential of distraction, last-minute electioneering or pressure, and unfair advantage" which the Board sought to curtain in *Milchem.* They were of the view that no justifiable purpose was served by the union's conduct, nor was the conduct devoid of campaign rhetoric, which might minimize its impact on employees. Rather, the union unabashedly and repeatedly purchased drinks for employees prior to, during, and after the election, even to the point of encouraging some employees to delay their arrival at the polls by having another drink, and then underscored the connection between its largess and the election by exhorting them to vote for the union. In he dissenters' view, this blatant last-minute campaigning immediately prior to and after the opening of the polls in proximity to the polling area at the very least distracts voters and may possibly sway their votes, and such conduct undermines the integrity of Board elections and disrupts the atmosphere in which they should be conducted. Finally, they stated that even if the union's conduct was not a planned campaign tactic, the union took unfair advantage of a fortuitous circumstance, the effect of which impaired the employees' free choice.

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[79] 259 NLRB 959 (Members Fanning, Jenkins, and Hunter; Chairman Van de Water and Member Zimmerman dissenting).

[80] *Movsovitz & Son,* 194 NLRB 444 (1971), and cases cited therein at fn. 3; *Lach-Simkins Dental Laboratories,* 186 NLRB 671 (1970); *Jacqueline Cochran,* 177 NLRB 837 (1969).

[81] 170 NLRB 362 (1968).

In *Davlan Engineering,*[82] the Board panel majority, agreeing with the regional director, adhered to established precedent which holds that the solicitation of authorization cards by employees, standing alone, does not make those employees agents of the union.[83] The regional director found and the panel majority agreed, that the soliciting employees were not agents of the union and that statements made by them were not imputable to the union.

Chairman Van de Water, dissenting, argued that as the employees involved were given authority to solicit authorization cards and as the union business agent provided one of the employees with authorization cards and instructions to distribute them on his own time, the employees were granted a limited agency to act on behalf of the union. Thus, in his view, any comments they made with respect to such solicitation of cards were attributable to the union. Granting that such employees are not agents of the union with respect to all matters concerning the organizational campaign, Chairman Van de Water found that when employees were permitted or authorized to solicit union authorization cards, any comments they made to other employees about such cards were within the scope of their limited agency and therefore imputable to the union.

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[82] 262 NLRB 850 (Members Fanning and Zimmerman; Chairman Van de Water, dissenting).

[83] *Allied Metal Hose Co.*, 219 NLRB 1135 (1975); and *Jefferson Food Mart, d/b/a Call-A-Mart*, 214 NLRB 225, 228 (1974).

V

Unfair Labor Practices

The Board is empowered under section 10(c) of the Act to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. In general, section 8 prohibits an employer or a union or their agents from engaging in certain specified types of activity which Congress has designated as unfair labor practices. The Board, however, may not act to prevent or remedy such activities until an unfair labor practice charge has been filed with it. Such charges may be filed by an employer, an employee, a labor organization, or any other person irrespective of any interest he or she might have in the matter. They are filed with the regional office of the Board in the area where the alleged unfair labor practice occurred.

This chapter deals with the decisions of the Board during fiscal year 1979 which involved novel questions or set precedents that may be of substantial importance in the future administration of the Act.

A. Employer Interference With Employee Rights

Section 8(a)(1) of the Act forbids an employer "to interfere with, restrain, or coerce" employees in the exercise of their rights as guaranteed by section 7 to engage in or refrain from engaging in collective bargaining and self-organizational activities. Violations of this general prohibition may be a derivative or byproduct of any of the types of conduct specifically identified in paragraphs (2) through (5) of section 8(a),[1] or may consist of any other employer conduct which independently tends to interfere with, restrain, or coerce employees in exercising their statutory rights. This section treats only decisions involving activities which constitute such independent violations of section 8(a)(1).

1. Forms of Employee Activity Protected

The forms that the protected concerted activity may take are numerous. The following cases decided by the Board during the past year provide a representative sample of the types of such activity examined by the Board.

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[1] Violations of these types are discussed in subsequent sections of this chapter.

In *J. W. Microelectronics Corp.*,[2] the Board agreed with the administrative law judge that an employees' work stoppage to protest the racially motivated harassment suffered by night-shift employees when they left work was concerted activity for the purpose of "mutual aid or protection" within the meaning of section 7 of the Act. Accordingly, the Board affirmed the administrative law judge's finding that the employer violated section 8(a)(1) by terminating two employees for participating in the work stoppage. The employees wanted to be assured that, when leaving work, they would not be subject to racially motivated heckling or threats to their physical well being by white nonemployees who gathered in the employer's parking lot. The Board concluded that therefore the employees had a specific demand related to their conditions of employment, since their problem existed only because of their attendance at work.

In finding the violation, the Board rejected the employer's contention that the employees' concerns were beyond its control. The Board observed that the hecklers were able to harass employees because they were allowed to congregate in the parking lot area, on property rented by the employer. It noted that, as a tenant of the property, the employer could have the hecklers removed, but that, as of the week of the work stoppage, its responses to the employees' complaints had failed to secure the area. The Board stated that the employer's claim that the employees' concerns were outside its control was belied by the employer's actions in response to the employees' complaints, including obtaining the landlord's agreement to build a fence around the lot and having the bus stop moved to the front of the plant.

In *Comet Fast Freight*,[3] a Board panel considered a case of an employer which discharged an employee for refusing to drive a truck because he believed it to be unsafe. The employee admitted in his pretrial affidavit that "I was looking out for myself, not the other drivers. The other drivers did not mind driving the red truck like I did." The administrative law judge concluded that "even though [the employee] was not concerned about the safety of the other drivers, his refusal to drive the truck was, in legal contemplation, concerted activity protected by Section 7 of the Act, and his discharge therefor was a violation of Section 8(a)(1)." In support of his conclusion, the administrative law judge found that inasmuch as this truck, to the employer's knowledge, was driven on occasion by other employees of the employer, the complaint involved a safety problem of concern to all of them and none of them disavowed the complaint. The panel majority reversed the administrative law judge and dismissed the complaint, concluding that the employee's refusal to drive the truck did not constitute concerted activity. While agreeing with the administrative law judge that the employee's subjective lack of concern for his fellow employees was not controlling, they stated that "What is of import, however, is [the employee's] admission that the other drivers did not mind driving the truck in question; and it is this admission which must be construed as evidence that [the employee's] fellow employees did not share his concerns, and that the condition of the truck was of moment to him alone." Accordingly, the majority concluded that, since the employee's coworkers had not made common cause with him concerning the truck, the employee's refusal to drive the truck did not constitute concerted activity within the meaning of the Act.

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[2] 259 NLRB 327 (Chairman Van de Water and Members Fanning, Jenkins, and Zimmerman)

[3] 262 NLRB 430 (Members Fanning and Zimmerman; Member Jenkins dissenting).

Member Jenkins, dissenting, would have found, like the administrative law judge, the employee's refusal to drive an unsafe truck constituted concerted activity within the meaning of the Act and that the employee's discharge therefor violated section 8(a)(1). In his dissent, Member Jenkins asserted that the majority's dismissal of the complaint herein reversed many years of Board precedent protecting the rights of individual employees under the statute the Board is charged to administer. Thus, he stated that "[t]he Board through a long line of cases has held that if an individual has a reasonably held belief that a piece of job-related equipment is unsafe, that employee has the right to voice this concern and, if it is uncorrected, to refuse to operate the equipment and the Board will protect that right."[4] Further, he was of the view that the Board, relying on the employee's alleged admission that other drivers did not mind driving the truck, merely seized upon this inadvertent comment and punished him for not being prescient of a major change in Board policy. As a result, Member Jenkins submitted that the majority's reliance on the employee's statement, without evidence that his fellow employees had no concern for the lack of safety, was insufficient to establish that the employees did not share his concern. Accordingly, he would find the violation.

In reply the majority distinguished the case from *N.L.R.B.* v. *Interboro Contractors,*[5] relied on by Member Jenkins, on the grounds that in *Interboro* the employee acted on behalf of his fellow employees as well as in an attempt to enforce this applicable provision of the collective-bargaining agreement. Members Fanning and Zimmerman stated that their decision did not effect a major change in Board policy, since, when confronted with direct evidence that the coworkers did not mind driving the truck, they would be hard-pressed to rely on a supposition of common cause which had no basis in fact.

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[4] Citing, *inter alia, Alleluia Cushion Co.,* 221 NLRB 999 (1975).

[5] 338 F.2d 495 (2d Cir. 1967), enfg. 157 NLRB 1295 (1966).

In *Carpenters Loc. Union 35*,[6] a Board panel considered the issue of whether two employees of a union were engaged in protected concerted activities, when they complained to the Department of Labor about certain internal financial and election irregularities and, in one employee's case, for having caused an investigation to be conducted of their employer's financial secretary by a local credit association. The employees, who were members of the union, were employed by it as assistant representatives. Prior to taking the above-mentioned actions, they had spoken out at executive board meetings and general membership meetings about their concerns regarding the financial secretary's conduct. Subsequently, the two employees, concerned about what they believed to be irregularities in the employer's nominating procedures and about the alleged mishandling of union funds by the financial secretary, went to the Department of Labor to voice their complaints. In an effort to document their claim of misuse of union funds, one of the employees sought information concerning the financial secretary from a credit association, in which the employer had an account.

Thereafter, the employees and other members protested the election results to the international union which denied their protest. When one of the employees sought to have his employment term extended, the executive board to which the matter was referred for decision, on motion of the financial secretary, decided not to extend the employment term of the employee; it also voted not to have the second employee's term of employment continue on an "indeterminate" basis. At a subsequent general membership meeting, the financial secretary moved to have the second employee terminated and the motion carried so that the employee was effectively terminated.

The panel majority agreed with the administrative law judge that both employees were discharged for complaining to the Department of Labor and that one of them was also discharged for conducting an investigation of the financial secretary with the Credit Association. They disagreed, however, with the administrative law judge's finding that the employees' conduct was not protected by section 7 of the Act and that their discharges were not unlawful. The panel majority found that both employees were engaged in intraunion conduct protected by section 7 of the Act when, acting in their capacity as union members, and, in the case of one employee, also as trustee, they complained to the Department of Labor about alleged irregularities in the election nominating procedures and of the alleged misuse of union funds by the financial secretary.[7] Having found that the two employees' activities were protected, the majority further found that, by its discharge of the two employees, the union, in its capacity as an employer, violated section 8(a)(1) of the Act.

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[6] 264 NLRB 795 (Members Jenkins and Zimmerman; Member Fanning dissenting).

Member Fanning, dissenting, would not have found the violation. In his view, the actions of the employees were not directly related to "collective bargaining or other mutual aid or protection" as set forth in section 7 and were completely unrelated to their own terms and conditions of employment. They were disciplined as employees for their actions as employees with respect to their employer's conduct of its business. He argued that as members of the employer labor organization, the employer took no action against them. Member Fanning reasoned they were not entitled to protection under the Act unless their purpose as well as their actions fitted the framework of section 7. While rejecting the majority's conclusion that the two employees acted as members of the employer rather than employees, Member Fanning asserted that, even if they acted as members, the employer has a right to manage its own business affairs without interference from employees who are also members. In his view, the fact that they were members as well as employees did not suffice to establish the violation.

Contrary to the dissent, the majority submitted that the evidence firmly established that the employees' conduct in complaining to the Department of Labor and the Marin County Credit Association was undertaken not in their employment capacity of business representatives, but as members of, and in one case, as an officer of, the employer. Members Jenkins and Zimmerman stated that it was clear that their discharges were motivated, not by employee misconduct on their part, but, rather, by their intraunion activity which is protected under the Act.[8]

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[7] The panel majority also noted that the second employee's investigation of the financial secretary with the credit union was intimately related to and done in furtherance of his other activities found protected since he was seeking to obtain information in connection with the complaint filed with the Department of Labor. Thus, they concluded that this aspect of the employee's conduct constituted protected concerted activity within the meaning of sec. 7 of the Act.

[8] In this connection, the panel majority found the administrative law judge's reliance on *Butchers Union Loc. 115, affiliated with Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO (Ernest S. Cerelli)*, 209 NLRB 806 (1974), was misplaced since, in that case, the corporate employees were attempting to effectuate a change in management hierarchy. The majority pointed out that, here, there was no evidence that either employee was seeking to have any of the union's officials removed from office, but instead were attempting to maintain the integrity of their collective-bargaining representative by exposing what they believed to be corrupt internal union practices. In the instant case, the majority found that the employees were attempting to maintain the integrity of their collective-bargaining representative by exposing what they believed to be corrupt union practices.

In *Daniel Constr. Co.,*[9] a Board panel, in agreement with the administrative law judge, found that the discharge of a worker at a nuclear power plant, who unilaterally chose not to perform a portion of his job duties because he did not want to receive as much radiation as the job involved, did not violate the Act. It concluded that while "it is unclear from the record whether [the employee] was specifically aware of 'jumping the pipe' prior to the time he took the job with [the employer], it is quite clear that [he] was aware that he would necessarily be exposed to above normal radiation while in [the employer's] employ, and that the job was, in a sense, inherently dangerous." [10] The Board panel further noted that there was no evidence that jumping the pipe could be made any safer, or that it was the employee's objective to persuade the employer to take steps to make the task safer when he refused to perform it. In finding no violation in the discharge of the employee for choosing unilaterally not to perform part of the job he was hired to do, the panel distinguished *Alleluia Cushion, supra,*[11] where an employee was protesting the employer's failure to meet state safety standards on the ground that, here, there was no evidence that the employee was asserting that the employer was not in compliance with Federal regulations on nuclear safety. Finally, the Board panel noted that the employee was not entitled to protections afforded economic strikers because he was only refusing to do a part of his job rather than the entire job.

In *American Federation of State, County & Municipal Employees,*[12] the full Board affirmed the administrative law judge's dismissal of a complaint alleging that the employer, a labor organization, violated the Act when it told an employee not to testify in a state court civil suit, threatened him with job loss if he did, and discharged him for actually doing so. A statutory supervisor, who had been discharged, attempted to vindicate personal rights under a strike settlement by bringing a state court civil suit against the employer. The supervisor subpoenaed several employees to testify on her behalf. These employees had earlier struck to protest the supervisor's discharge, but returned to work after a settlement was reached in which the supervisor was to be given a hearing to review her termination. One of the subpoenaed employees informed his supervisor of the subpoena, but was told by his supervisor not to testify, under threat of discharge if he did so. Thereafter, the employee testified and was subsequently discharged for doing so.

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[9] 264 NLRB 770 (Chairman Van de Water and Members Fanning and Hunter).

[10] "Jumping the pipe" required an employee to enter an empty pipe which is normally used to carry water to cool the nuclear reactor.

[11] Chairman Van de Water and Member Hunter noted that, by distinguishing *Alleluia Cushion*, they did not necessarily imply agreement with its holding or rationale.

[12] 262 NLRB 946 (Chairman Van de Water and Members Fanning, Jenkins, Zimmerman, and Hunter).

The administrative law judge first considered the employees' purpose in striking to protest the supervisor's discharge. He stated that, if the employees are striking simply for the purpose of assisting a supervisor in his or her own personal plight, they are, by definition, not seeking "mutual aid or protection," since the supervisor is not an employee. The burden would be on the General Counsel to prove that the employees' strike did have a direct impact on their own job interests. In the instant case, the administrative law judge concluded that the employees' strike was to protest the supervisor's personal situation and not their working conditions.

He stated, however, that, even if the strike protest was not protected, attempts to enforce the strike settlement agreement, a quasi-collective-bargaining agreement, could arguably constitute a protected act in and of itself. However, the administrative law judge concluded that since the striking employees settled for a hearing to review the supervisor's termination as a way of assisting her in getting her job back, it could be inferred that reinstatement of the supervisor was the sole purpose of the strike. Even assuming the strike settlement agreement gave the supervisor rights normally negotiated for an employee, she was still not protected by the Act because of her employment status as a "supervisor." Accordingly, the administrative law judge concluded that even though the employee may have sought enforcement of a quasi-collective-bargaining agreement on the supervisor's behalf, his conduct was not protected by section 7 of the Act.

Finally, the administrative law judge observed that the discharged employee made no claim that the supervisor's reinstatement would in any way affect his working conditions. Here the employee, by testifying in the court action, had not demonstrated that he was seeking "mutual aid or protection" or that the employer would cause the court to make a decision which would have a direct impact on the employee's own job interests.[13] Further, the General Counsel failed to show by competent evidence that an object of the employee's giving testimony on behalf of the supervisor in her lawsuit, though intended to enforce a quasi-collective-bargaining agreement, was for the purpose of influencing either the employee's own working conditions or those of employees at his former employer's successor. Accordingly, the administrative law judge dismissed the complaint, and the Board affirmed.

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[13] The administrative law judge had concluded that *Puerto Rico Food Products Corp.*, 242 NLRB 899 (1979), enforcement denied 619 F.2d 153 (1st Cir. 1980), insulated the employer from liability under sec. 8(a)(3) or (1) of the Act for whatever the employer did to the employee for participating in the lawsuit.

In "*Restaurant Horikawa,*"[14] a Board panel majority, reversing the administrative law judge, found that an employee, a waitress, who participated in a demonstration inside the employer's restaurant during business hours, forfeited the protections of the Act and was therefore subject to any discipline the employer chose to impose upon her. The employee, who was on her own time, was part of a group of some 30 persons demonstrating in front of the building where the employer's restaurant was located. The demonstrators who were protesting certain working conditions at the restaurant and certain of the employer's unfair labor practices, publicized their protests by leaflets and picket signs. However, the demonstrators, including the employee, without permission or invitation, entered the employer's restaurant, marched through the reception area where 13 customers were waiting to be seated and to the back of the restaurant where the administrative offices were located. After confronting the manager, and engaging in a brief exchange, the demonstrators left the restaurant, chanting Japanese words.

Although agreeing with the administrative law judge that the demonstrators were engaged in protected concerted activity while they remained outside, the panel majority found that, once they took the demonstration inside, the employees lost the protection of the Act. In so finding, the majority stated that the principles which underlie the broad proscription of union solicitation in a retail setting were equally applicable to conduct of the kind involved here. Thus, they concluded that the uninvited invasion of the employer's restaurant premises transgressed the boundaries by which concerted activity is deemed protected by the Act, even where, as here, the activity was nonviolent, and in protest of the employer's unlawful conduct. Further, the majority noted that the employee's status as employee did not confer upon her any special status and attached no significance to the fact that the employer had no rule prohibiting employees from entering the restaurant on their nonworking time since the use of the restaurant by employees while not at work could not be equated to, nor validly be compared to, a mass demonstration. Under these circumstances, the complaint, alleging that the employer violated section 8(a)(1), was dismissed.

Dissenting Member Fanning, like the administrative law judge, concluded that the employee's participation in the group demonstration, of short duration, inside the restaurant where the employee was employed "did not on balance justify terminating her employment particularly where the demonstration involved the protest of the employer's unfair labor practices." He stated that the majority's description of what occurred in the restaurant was exaggerated and not supported by the record. In his view, the demonstration was virtually innocuous since the group-crossing of the public areas of the restaurant was orderly and the interruption and disruption of the restaurant was negligible. Balancing the employee misconduct against the severity of the unfair labor practices that provoked the strike, Member Fanning concluded that the apparent continuation of the employer's reprisals for union activity far outweighed the speculative impact of the brief demonstration in which the employee participated.

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[14] *G.T.A. Enterprises, d/b/a "Restaurant Horikawa,"* 260 NLRB 197 (Members Jenkins and Zimmerman; Member Fanning dissenting).

In *Benjamin Electrical Engineering,*[15] a Board panel adopted the administrative law judge's finding that the employer did not violate the Act by discharging an employee for complaining about unsafe working conditions, since the employee's conduct was not truly directed at the matter of safety, but rather towards enforcement of union contractual conditions on the job, and that the employee's manner of complaining was insubordinate and therefore unprotected. During the employee's 4-day work tenure with the employer, the employee repeatedly interrupted his work to register complaints with the foreman, concerning matters he impliedly threatened to have changed by the union; and he walked off the job, on the 22d floor, to telephone the union from a street-level phone whenever he pleased, frequently without permission, and contrary to the instructions to stay on the job. He also overtly demonstrated his refusal to recognize the authority of one of the foremen by telling him that he would not take orders from him. Upon these facts, the panel concluded that the sole reason for the employee's discharge was his insubordinate manner of complaining rather than the content of his complaints even assuming, as the General Counsel contended, the "real" object of the employee's conduct constituted protected concerted activity.[16] Accordingly, finding that the employer discharged the employee for engaging in insubordinate conduct unprotected by the Act, the panel dismissed the complaint.

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[15] 264 NLRB 1061 (Members Jenkins, Zimmerman, and Hunter).

[16] Member Hunter agreed that the employee's complaints were not protected because of the manner in which they were made and therefore he found it unnecessary to pass on whether these kinds of complaints would, in other circumstances, be concerted, protected activity.

2. Union Representation at Disciplinary or Investigative Interviews

Section 9(a) of the Act, which provides for exclusive representation of employees in an appropriate bargaining unit, contains the following proviso: "*Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment."

In two cases during the 1975 report year—*Weingarten* and *Quality*[17]—the Supreme Court upheld the Board's determination that section 7 of the Act gives an employee the right to insist on the presence of his union representative at an investigatory interview which he reasonably believes will result in disciplinary action. The Court concluded that the Board's holding "is a permissible construction of 'concerted activities' . . . for mutual aid or protection' by the agency charged by Congress with enforcement of the Act . . . ."

During the report year, the Board had occasion to apply the principles set forth in *Weingarten* and *Quality* in a number of cases. In *Materials Research Corp.,*[18] the Board was presented with the question of whether the *Weingarten* doctrine was applicable to employees who were not represented by a union. The employer denied the charging party employee's request that a coworker accompany him to investigatory interviews which the employee reasonably believed might result in disciplinary action. The employee, along with two other employees, sought to discuss with management their dissatisfaction over changes in their work schedule and asked their departmental manager if they could discuss the matter with management at another meeting. In denying their request for a group meeting, the employer's plant manager responded that there was no group problem and that he was available to discuss individual problems with any employee. After talking in his office with several other employees about the request for a group meeting, the manager told the employee he would like to speak with him in his office. At this point, the employee stated that he was entitled under Federal law to have another worker present at a disciplinary hearing or at an investigative hearing from which discipline would reasonably result. The manager responded that the employee had no such right at the plant and that he would talk to the employee in his office, if the latter wished. Thereafter, a meeting ensued during which the manager questioned the employee about why he organized the group meeting, and, after a brief argument over whether or not the employee had a right to organize a meeting, the meeting ended. Later that day, the employee was told that the manager wanted to talk with him and, when he arrived at the manager's office, he was informed that "this is a disciplinary hearing." When the employee got up to leave, saying that he did not have to be there for a disciplinary hearing "without proper representation" and that he was going to get another employee to come in with him, the manager stated then that the employee was not permitted to do this and ordered him to sit down. He complied. The manager then gave the employee a verbal warning for failure to follow company grievance procedure and for organizing the group meeting on production time. After discussion and argument about the employee's discipline, the manager placed a typewritten memorandum of the verbal warning in the employee's personnel file.

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[17] *N.L.R.B.* v. *Weingarten,* 240 U.S. 251; *Intl. Ladies' Garment Workers' Union, Upper South Dept., AFL-CIO* v. *Quality Mfg. Co.,* 420 U.S. 276.

[18] 262 NLRB 1010 (Members Fanning, Jenkins, and Zimmerman; Chairman Van de Water and Member Hunter concurring and dissenting).

The Board majority, contrary to their dissenting colleagues and to the administrative law judge concluded that the *Weingarten* right to request the presence of a representative at an investigatory interview flows from the section 7 right of employees to engage in concerted activity for mutual aid and protection and that the rationale of *Weingarten* compels the conclusion that unrepresented employees are entitled to the presence of a coworker at an investigatory interview. In so concluding, they stated that the decision in *Weingarten* was framed in terms of the right to the assistance of a "union representative" at an investigatory interview, but that terminology was utilized because it accurately depicted the specific fact pattern presented, i.e., an employee in an organized facility requesting the assistance of her union steward, and not because the Supreme Court intended to limit the right recognized in *Weingarten* only to unionized employees. This was readily apparent from the *Weingarten* decision itself where the Court emphasized that the right to representation is derived from the section 7 protection afforded to concerted activity for mutual aid or protection, not from a union's section 9 right to act as an employee's exclusive bargaining representative.

The majority observed that it was by now axiomatic that, with only limited exceptions,[19] the protections afforded by section 7 did not depend on whether or not the employees involved were represented by a union, or whether the conduct involved was related, directly or indirectly, to union activity or collective bargaining[20] and that while the precise issue of the applicability of *Weingarten* to unrepresented employees had not been previously decided, the Board, in a number of cases presenting related issues, had considered the scope of the *Weingarten* right and had indicated that it applied to organized and unorganized employees alike.[21] Since a purpose underlying *Weingarten* was to prevent an employer from overpowering a lone employee, the majority concluded that the presence of a coworker, even if the individual did nothing more than act as a witness, still effectuated that purpose just as the presence of a union representative. Concluding, therefore, that the right enunciated in *Weingarten* applied equally to represented and unrepresented employees, the majority found that the employer violated section 8(a)(1) of the Act by conducting investigatory interviews with the employee, after having refused his request to have a coworker present to assist him.

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[19] See *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50 (1975).

Chairman Van de Water dissented from the finding that the employer's investigatory interview herein violated the Act because, in his view, an employe's section 7 right to representation at an investigatory interview, which he reasonably believes may result in his discipline, does not attach unless there is a duly recognized or certified union on the scene. Thus, he asserted that in *Weingarten*, just as in the cases which provided its historical framework, the existence of an established collective-bargaining relationship was central to the definition and scope of an employee's right to representation. Likening the role of the *Weingarten* representative to that of a labor organization in its dealings with the employer, Chairman Van de Water additionally asserted that the majority decision impinged upon the employer's right to deal individually with its employees in the absence of a collective-bargaining relationship. He believed that the majority was amending, rather than giving application to, the Act by creating nonstatutory rights that could be utilized without regard to the Act's checks and balances, thereby permitting a limited section 7 right "to run wild" beyond congressional intent.

Member Hunter also dissented from the majority's decision with regard to their extension of *Weingarten* rights to unrepresented employees. Although the employer was under no duty to bargain with the union representative who was present at an investigatory interview, Member Hunter was of the view that this *Weingarten* right to the presence of a steward or other union official flowed from the status of the union as collective-bargaining representative and that these considerations were not relevant in the context of unrepresented employees, and could not sustain an extension of the *Weingarten* doctrine in that context. Pointing out that, in *Weingarten,* the Supreme Court underlined the importance of the role of a knowledgeable union representative in assisting the employer in eliciting favorable facts, he noted that, in a nonunion situation, the employer is likely to be confronted with a "representative" who has few or even an absence of skills or responsibilities that one would expect from a union steward. Finally, Member Hunter adverted to his dissent in *Pacific Telephone & Telegraph,*[22] where he expressed his disapproval of the expansionist Board decisions that have interpreted *Weingarten* so as to encourage the transformation of investigatory interviews into formalized adversary proceedings, a result the Supreme Court clearly wished to avoid, and where he generally delineated the number and variety of problems inherent in an expansionist interpretation of *Weingarten.*

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[20] *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962). In that case the Supreme Court extended the protection of sec. 7 to unorganized employees who walked off the job to protest the lack of adequate heat in their plant.

[21] See *Glomac Plastics*, 234 NLRB 1309 (1978); *Anchortank*, 239 NLRB 430 (1978); and *Ill. Bell Telephone Co.*, 251 NLRB 932 (1980). The majority observed that Chairman Van de Water's assertion in his dissent that the *Weingarten* right is "the right to be free from employer interference which deprives employees of the representation of their *duly chosen agent*," reflected a misreading of the development of the Board's interpretation of sec. 7 as affirmed by the Supreme Court.

In *E. I. DuPont de Nemours,*[23] a Board panel agreed with the administrative law judge that the employer violated section 8(a)(1) of the Act by refusing to permit an employee to have a co-employee of his choice present at an investigatory interview, and by suspending and later discharging him because he refused to submit to an inter-iew without a witness of his choice. The employee had posted on he canteen bulletin board a "Notice to Employees" which he had eceived from the Regional Office of the Board. A supervisor told he employee he was violating company policy by posting the otice without permission, although the employee had previously sed the bulletin board without incident. The supervisor told the nployee that he wanted to discuss this incident with him later. ne employee had been placed on probation by the same supervisor cause of a previous rule infraction and at that time had been rned that he would have to "follow the rules to the hilt," and at his work would be reviewed monthly. The supervisor asked e employee two times to discuss the notice posting incident in his ice, but each time the employee stated his willingness to do so, if could have a fellow employee present. Within 5 minutes after refusal to discuss the canteen incident without a coworker's sence at the interview, the supervisor told the employee to

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262 NLRB 1048 (1982), where the Board found that *Weingarten* encompassed a right to consultation as well as a right to be informed of the subject matter of the interview.

262 NLRB 180 (Members Fanning, Jenkins, and Zimmerman).

gather his personal belongings and report to the foreman's desk. Once there, the employee declined to discuss with the supervisor the notice posting incident unless a fellow employee was a witness. The supervisor refused to enter into a discussion with the coworker present and attempted to persuade the employee to accept the presence of another supervisor as an acceptable witness, but the employee refused. Thereafter, the employee sought the assistance of another employee as it appeared to him that he was going to be disciplined. The supervisor then told him that this was his last chance for discussion of the incident and that his job was in jeopardy. After some further discussion, the employee was told he was being dismissed until further notice, but not discharged.

The Board panel concluded that the employer's purpose in interviewing the employee was to discuss the notice posting, and that the employee, who was on probation, had reasonable grounds for believing that disciplinary action would result from the interview. In these circumstances, it found, citing *Materials Research, supra,* that the employee has a right under section 7 of the Act to an employee witness and that his request was protected activity under section 7 so that the employer could not lawfully discipline the employee for asserting that right. Concluding that the employer had not demonstrated that the employee would have been discharged absent the protected activity, the panel found that the employer violated section 8(a)(1) of the Act by discharging the employee for asserting his *Weingarten* right.

In *E. I. DuPont de Nemours,*[24] the Board panel adopted the administrative law judge's finding, made prior to *Materials Research, supra,* that the employer violated section 8(a)(1) by discharging an employee for refusing to participate in an employer interview without the presence of a fellow employee as a witness when the employee had reasonable grounds to believe that the matters discussed might result in his being disciplined. The employee's relations with management were less than placid and recently the employee had filed a grievance concerning the severity of the employee's injuries resulting from an industrial accident. Thereafter, when the employee was suspended for his refusal to sign a timecard, he was directed to report to the office where his supervisor read an interview record which listed his deficiencies and directed him to sign it. The employee declined to do so and his supervisor called in another supervisor to witness the employee's failure to sign the interview record. At this point, the employee requested a witness, but the request was disregarded. Later the supervisor read another document—the employee's Development Program—and asked him to sign it. The employee refused to do so unless he was given a copy of it or in the alternative the right to have an employee present to witness the signing. Both requests were refused and he was immediately terminated.

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[24] 262 NLRB 1040 (Members Fanning, Jenkins, and Zimmerman).

In finding the 8(a)(1) violation, the administrative law judge reasoned that the *Weingarten* doctrine and its progeny articulated a section 7 right applicable to all meetings between employers and employees whenever the latter had a reasonable expectancy that discipline may result, and that simply because an employee requested a witness rather than a representative during the meeting did not deprive him of his right to a *Weingarten* representative. Accordingly, he concluded that the right to engage in concerted activity for mutual aid and protection was not dependent upon the existence of a statutory bargaining representative and that the *Weingarten* doctrine applied to employees who were not represented by a statutory bargaining representative. The Board panel, in adopting the administrative law judge's findings, cited *Materials Research Corp., supra.*

In *Pacific Telephone & Telegraph Co.,*[25] the Board was presented with the issue of whether the employer violated section 8(a)(1) by denying two employees the right to consult with their union representatives prior to conducting investigatory interviews. The employer decided to interview two employees who were accused of misusing company equipment and their work time. Thereafter, the employer notified their union that the employees would be suspended pending further investigation. The union stewards representing each of the employees separately requested, prior to the interviews, that the employer permit them to meet privately with each of them. Both requests were denied. As a result of the interviews, both employees were discharged.

The Board majority adopted without comment the administrative law judge's finding that the employer violated section 8(a)(1) by refusing to permit the two employees to consult with their union representative prior to the investigatory interviews which they reasonably believed might result in disciplinary action. In so finding, the administrative law judge relied on the Board's decision in *Climax Molybdenum Co. Div. of Amax,*[26] where the Board held that the employees' right to union representation clearly embraced the right to consultation prior to the *Weingarten* interviews.

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[25] 262 NLRB 1034 (Members Fanning and Zimmerman; Member Jenkins concurring in part and dissenting in part; Member Hunter dissenting).

[26] 227 NLRB 1189 (1977), enforcement denied 584 F.2d 360 (10th Cir. 1978). Despite the Tenth Circuit's adverse decision, the administrative law judge was constrained to apply the Board's *Climax* decision as established Board precedent which the Supreme Court had not reversed.

Member Hunter, dissenting for the reasons set forth in *Pacific Telephone & Telegraph Co.,*[27] would have reversed the administrative law judge. Because he believed there was no statutory right to prior consultation and particularly because it was clear that the employees were assisted by knowledgeable union representatives, member Hunter would have found that the employer conducted lawful interviews in accordance with the employee's *Weingarten* rights.

In a second *Pacific Telephone & Telegraph Co.*[28] case, two telephone installer/repairmen working in the field were abruptly summoned to the employer's office. Although arriving separately, each employee inquired of the service manager the purpose of the summons. The service manager refused to explain, but asked if they wanted union representation. Both men answered affirmatively. Shortly thereafter the chief union steward arrived and he asked the service manager what was going on. Apparently, the steward was told little or nothing about the purpose of the summons. Thereafter, the service manager, union steward, two other management officers, and one of the two employees met in an office. At the conclusion of the first employee's investigatory interview, the union steward asked if he could speak with the second employee prior to the commencement of his investigatory interview. The request was denied because, as stated by the employer's security representative, it would jeopardize the investigation. After the interviews, both employees were suspended pending dismissal and approximately 1 week later they were discharged for allegedly falsifying timesheets, and for unauthorized installation and receipt of telephone equipment.

In these circumstances, the administrative law judge found that the employer violated section 8(a)(1) of the Act by refusing to inform the two employees or their union representative, upon request, of the nature of the matter being investigated and by refusing to permit the union representative to consult with the employees prior to investigatory interviews which they reasonably believed would result in disciplinary action.

The panel majority agreed that the administrative law judge correctly found that, under the Board's decision in *Climax, supra,* employees have a section 7 right to consult with their representative before any interview to which *Weingarten* rights attach,[29] and

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[27] 262 NLRB 1048.

[28] *Ibid.* (Members Fanning, Jenkins, and Zimmerman; Member Hunter dissenting).

[29] Noting the Tenth Circuit's refusal to enforce the Board's decision in *Climax, supra,* on grounds that "the NLRB has enlarged upon the *Weingarten* holding to the extent that it includes pre-interview situations," the Board majority, however, concluded that the court's decision was readily distinguishable from the instant case. Thus, they observed that, unlike the em-

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that the employer violated section 7 by refusing to inform the employees of the nature of the matter being investigated. In this connection, they noted that "if the right to prior consultation, and, therefore, the right to representation, is to be anything more than a hollow shell, both the employee and his representative must have some indication as to the subject matter of the investigation" for, without it, there is nothing about which to consult. Additionally, in the view of the majority, *Climax* and the instant decision were fully consistent with, and required by, the *Weingarten* Court's interpretation of section 7, because "the act of 'consultation' is no less 'concerted activity for mutual aid or protection' than the act of 'representation' itself." [30]

The majority further observed that contrary to the suggestion of the dissent, this construction of section 7 did not present any greater possibility of transforming the interview into an adversary proceeding nor did it require that an employer's investigatory or disciplinary process take on attributes even remotely akin to a "full-scale criminal proceeding" as their dissenting colleague suggested. In their view, "all *Climax* requires is that, as a function of an employee's right to engage in concerted activity for mutual aid or protection, a pre-interview consultation with his *Weingarten* representative be permitted." Thus, a *general* statement as to the *subject matter* of the interview, which identified to the employee and his representative the misconduct for which discipline might be imposed, would suffice.

Member Hunter, in his dissent, would find that the employer did not violate the Act by refusing to allow the employees to consult with their union representative prior to an investigatory interview or by refusing to inform the employees or their union representative, upon request, of the nature of the alleged misconduct that prompted the investigatory interviews. In his view, *Climax* was wrongly decided and represent an unwarranted interference with legitimate employer prerogatives. He stated that the dissent in *Weingarten*, with which he generally agreed, submitted that at no time did the Supreme Court indicate that a right to representation encompassed a right to prior consultation, and, moreover, that the Supreme Court's definition of a "knowledgeable union representative" was different from that of the Board; thus, according to the

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ployees in *Climax*, where the employees made no request for and expressed no desire to have representation, the employees here made a direct request to the employer for information and representation and they also inquired of their union representative "what was going on?" the union representative responded that he did not know, but he would get some information. That action, the Board majority concluded, created an express agency relationship going beyond the union's formal status, the employees having made the union representative their "emmisary."

[30] Member Fanning viewed "prior consultation" as being neither different from, nor superior to, the right to representation itself. Rather, he concluded that consultation was merely an "aspect of that function which enables the representative to fulfill his role."

Court's dissent, the employee has a right to a union representative who is "generally knowledgeable about grievance resolution—not necessarily one who is completely versed with the employee's particular version of the events . . . ." In Member Hunter's view, by requiring prior consultation upon request, the Board encourages the very change in the essential nature of the interview that troubled the Supreme Court; i.e., transforming the interview into an adversary contest. Such a result, he contended, was clearly contrary to the Supreme Court's holding in *Weingarten*.

Further, Member Hunter disagreed that *Weingarten* contemplated a "right" to be informed in advance of the subject matter of an investigatory interview. This alleged "right," he asserted, not only had potential for transforming investigatory interviews into formalized adversary contests with the attributes of full-scale criminal proceedings, but also had the equally undesirable potential of interfering with legitimate employer prerogatives. Finally, he argued that even if "the Supreme Court left to the Board's discretion questions such as prior consultation, notice, and the like," there were compelling policy considerations why the Board should not go beyond the *Weingarten* holding. He suggested that by extending *Weingarten* the Board may well succeed in persuading employers to dispense with the interview altogether. Thus, he concluded that adequate representation was assured by the presence of the union representative at the actual interview and nothing more was required under *Weingarten* and nothing more should be required of the employer by the Board. Accordingly, he would dismiss the complaint in its entirety.

3. No-Solicitation Rules

Intermedics & Surgitronics Corp.,[31] presented the issue of whether an employer's maintenance of a no-solicitation rule which prohibited organizational activity during "working time" was overbroad and in violation of section 8(a)(1). The employee handbook contained two rules: (1) a rule against solicitation or distribution on company property which the employer conceded was invalid and (2) a rule prohibiting unauthorized solicitation "on working time." The administrative law judge found that both rules were invalid, reasoning that to the extent the no-solicitation rule was inconsistent with the no-solicitation/no-distribution rule, "the conflicting rules created an ambiguity which would reasonably tend to inhibit permissible solicitation by employees who would be uncertain of which rule the employer intended to enforce." He further noted that the fact that the rules were not enforced was not a defense because the mere existence of an invalid rule interfered with employees' rights under the Act.

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[31] 262 NLRB 1407 (Members Fanning, Jenkins, and Zimmerman; Chairman Van de Water and Member Hunter concurring and dissenting).

In adopting the administrative law judge's ultimate conclusion hat both rules were invalid, the Board majority noted that the administrative law judge implicitly found valid the rule prohibiting olicitation "on working time" and then determined that this latter ule was governed by *T.R.W. Bearings Div.*, [32]where a rule prohibiting organizational activity during "working time" was found to be verly broad and therefore invalid. Accordingly, the Board majority ound, in agreement with the administrative law judge, that both ules were invalid and violated section 8(a)(1).

Chairman Van de Water and Member Hunter concurring and issenting, agreed with the majority that the employer violated sec- ion 8(a)(1) by its rule which prohibited "soliciting . . . on company roperty." They disagreed with the majority's conclusion that the ule prohibiting solicitation "on working time" was invalid under ne Board's decision in *T.R.W.* to which they could not subscribe. In ieir opinion, the better view of the law was set forth in *Essex itl.*,[33] the case overruled by *T.R.W.*, where the Board majority rew a valid and significant distinction between no-solicitation and o-distribution rules which use the term "working hours" and iose using the term "working time." The *Essex* majority found iat the "working hours" rule was presumptively invalid because e term "work hours" could reasonably be calculated to mean that nployees were prohibited from engaging in union activity for eir *entire* workday, including their break and lunch periods; and at the "work time" or "working time" rules were presumptively lid because the terms connote time spent in the performance of *tual* job duties, which, of course, would not include time slated lunch or break period. Finding presumptively valid a rule iich prohibited solicitation or distribution during work or work- g time, the dissenters stated that they would require a party at- mpting to invalidate the rule to show by extrinsic evidence that, twithstanding the rule's wording, it was enforced so as to restrict ion solicitation at a time when it was permissible to engage in ch activities. They further noted that implicit in the administra- e law judge's analysis of the "working time" rule herein was a ding that the rule was facially valid and that a violation was nd only because of the ambiguity created by the two conflicting es. In their view, Chairman Van de Water and Member Hunter

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257 NLRB 442 (1981).
211 NLRB 794 (1974).

did not see the ambiguity as a reason to hold that the otherwise valid rule violated the Act.

4. Threats to Employees

In *Grocery Carts,*[34] a Board majority found, in agreement with the administrative law judge, that an employer did not violate the Act by discharging an employee who, during a conversation about improved wages and benefits, asked a supervisor how a union "would work." The employee earlier had jokingly asked her general store manager to give her a raise. In response to his denial, the employee said, "wouldn't it be a good idea if . . . you paid the employees . . . a little better wages plus you gave them some benefits" and then added "what about a union, how would that work?" The manager then said "no, no that wouldn't work" and just dropped the subject. Relying on *Natl. Wax Co.,*[35] the administrative law judge concluded that the employee was not acting on behalf of other employees or a union and therefore her conversation with the manager did not constitute concerted protected activity protected by section 7 of the Act.

In adopting the administrative law judge's decision, the Board majority emphasized his findings that while the employee, during her conversation with the general manager, asked whether a union "would work," she did not indicate that she herself, or any other employee, was interested in or active on behalf of the union. They also noted that the manager's response was not accompanied by any threats and that the employee was not terminated until approximately 1 month after the conversation. Furthermore, the Board majority pointed out the administrative law judge's finding that there was no evidence of union animus and that the employee was discharged because she was cold and indifferent to customers, a problem about which she had personally been warned. Accordingly, the majority concluded that the General Counsel had failed to establish by a preponderance of the evidence that the employee was terminated unlawfully.

Members Fanning and Jenkins, dissenting in part, disagreed with the majority that an employee's conversation with an employer over improved wages and the benefits of unionization was unprotected by the Act. They reasoned that in discrimination cases, the employer's motivation is the controlling issue, not the fact that the employee had not previously discussed the matter with other employees, or that the employer was unaware of the employee's actual organizing activities. Further, the dissenters asserted that

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[34] 264 NLRB 1067 (Chairman Van de Water and Members Zimmerman and Hunter; Members Fanning and Jenkins dissenting in part).

[35] 251 NLRB 1064 (1980).

Natl., Wax Co., supra, was distinguishable because, unlike the situation there, which explicitly dealt with an individual employee's effort to obtain a merit increase and an employer's reaction thereto, the employee here began with a request for an individual increase and immediately broadened it to include wages and benefits for all. In addition, the dissents argued that proof of an unfair labor practice did not require proof of actual union activity, once it was shown that the suspected activity was what motivated the employer. Here, the dissenters asserted that it was plain from the manager's testimony that his conversation with the employee led directly to the original discharge recommendation and that it was equally plain that the discharge was a result of his "very strange" conversation with the employee in which she suggested that wages and benefits of all employees should be improved, possibly through the medium of a union. On this basis, they would find the discharge to be unlawful.

In *Ohio Brass Co.,*[36] the Board was presented with the issue of whether an employer violated section 8(a)(1) by asking, on its standard employment application form, whether the applicant had filed prior industrial; i.e., workmen's compensation, claims. Specifically, the form included questions, *inter alia,* of whether the applicant had ever been hurt in an industrial accident, had ever had any spinal injuries or complaints of a bad back, or had any physical limitations. The application further noted that all employment was dependent upon passing a physical examination.

Stating that it was well settled that it was unlawful for an employer to inquire into employees' past exercise of protected concerted activity, unless it had a substantial and legitimate reason therefor, the panel majority found that the employer had a legitimate and substantial business justification for its inquiry, i.e., the health and safety of its work force, and that, therefore, it did not violate the Act by so including on its application questions about whether an applicant had filed a prior industrial claim. The majority distinguished inquiries into an applicant's past history of industrial claims from inquiries into an employee's prior union experiences or affiliations which have been held to be *per se* unlawful, observing that the situation here was unlike that in *Krispy Kreme Doughnut Corp.,*[37] where the Board found that an employer had violated the Act by discharging an employee solely because of his express intent to file a workmen's compensation claim. The employer here made no attempt to "deny employees access to workmen's compensation benefits" by its simple inquiry nor did it "create a coercive aura which would dampen the salutary impact of workmen's compensation laws on job safety generally." Accordingly, the panel concluded that the employer did not violate the Act by asking such a question on its application form since, in the majority's view, it was a pertinent question "bearing upon the applicant's history of personal injury" and one which the employer was privileged to ask.

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[36] 261 NRLB 137 (Members Fanning and Jenkins; Member Zimmerman concurring).
[37] 245 NLRB 1053 (1979).

Member Zimmerman separately concurred with the majority view that the employer's inquiry on a standard application as to whether an employee filed an industrial claim did not violate the Act. However, he would find it unnecessary to examine whether the employer has substantial and legitimate business justification for such an inquiry. He noted that requiring such justification is valid with respect to union activity which is expressly protected by section 7 of the Act. The filing of workmen's compensation claims should, in his view, be distinguished as an *implied* section 7 right. He pointed out that such claims do arise out of the employment relationships, and are presumed to be of common interest to other employees, absent evidence of disavowal of concern by employees. The filing of such claims he noted is thus protected by the Act only through a rebuttable presumption that the activity was concerted, and, unlike union activity, it was not covered *per se* by the Act. Accordingly, Member Zimmerman concludes that mere inquiry into the filing of past claims could not be found unlawful in the absence of evidence of unlawful motive, and such unlawful purpose was absent here.

In *Life Savers,*[38] an employer sent a letter to employees, during a union organizational campaign, which stated, *inter alia,* that:

> In my opinion, if this group were successful it could lead to difficulties and problems of such seriousness that the continued effectiveness of our plant would be in jeopardy and all of our jobs and livelihood could be affected. . . .
>
> Your vote of "NO" is extremely important to you, to the future continuation of this Company, and to your future ability to earn a decent livelihood and provide a dignified life for yourself and your family.

In determining that the letter violated section 8(a)(1) of the Act, the administrative law judge, without specifically articulating his reasons for finding a violation, relied on the earlier Board determination in the underlying representation case, which held that the letter contained statements which constituted interference with the election.

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[38] 264 NLRB 1257 (Members Fanning and Zimmerman; Member Jenkins dissenting).

In this connection, the Board panel majority observed that while conduct violative of section 8(a)(1) is *a fortiori* conduct which interferes with an election, the reverse situation is not necessarily true given the fact that section 8(a)(1) must be read in conjunction with the provisions of section 8(c). However, they agreed with the administrative law judge's conclusion that the statements in the letter violated section 8(a)(1) of the Act, despite his failure to analyze the letter under an unfair labor practice analysis. In so concluding, they found that the employer had not shown that its prediction of the effects of unionization was based on objective facts within the meaning of the Supreme Court's decision in *N.L.R.B.* v. *Gissel Packing Co.*[39] Concluding that the letter was a threat of loss of employment and of adverse consequences to employees if the union were selected as the collective-bargaining representative, the panel found, in agreement with the administrative law judge, although under a different analytical framework, that the letter constituted a violation of section 8(a)(1) of the Act.[40]

In *Daniel Constr. Co., Div. of Daniel Intl. Corp.*,[41] an official of the employer, during the course of several meetings, answered employee questions about job security. In response to an employee's question as to whether another employer for whom the employer provided services would cancel its contracts with the employer if the union came in, the official replied:

> I said that the contract does give the client, all of our maintenance clients throughout the United States, the right to cancel the contract within [sic] 30 days notice, and they had the right for any reason, that we had to maintain a competitive posture on this job as we do on other jobs, and if we were no longer competitive, why they could cancel the contract.

The administrative law judge concluded that the official answered the employees' questions about job security during the course of several meetings in a manner purposefully designed to impart an implicit threat that union representation would mean loss of jobs and that the official's failure to elaborate on his use of the word "competitive" painted a subtle, yet ominous, picture of the employer's inability to remain competitive in the event it became unionized. Since, in the administrative law judge's view, this was exactly the type of prediction the Supreme Court had proscribed in *Gissel*,

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[39] 395 U.S. 575 (1969), where the Supreme Court declared that an employer is free to communicate to its employees its views concerning the consequences of unionization "so long as the communications do not contain a 'threat of reprisal of force or promise of benefit,' " and so long as the prediction of the effects of unionization is based on objective facts.

[40] Member Jenkins, in accord with his vote in the representation case, would not find this violation.

[41] 264 NLRB 569 (Chairman Van de Water and Member Hunter; Member Jenkins dissenting).

supra, he found that the employer's official uttered a "threat" based on misrepresentation and coercion and thereby violated section 8(a)(1) of the Act.[42]

In reversing the administrative law judge the panel majority found that the official neither expressly nor implicitly predicted what impact unionization would have on the employer nor did he threaten employees with reprisals if the union won the election, and therefore *Gissel* was inapposite. They concluded that the official's answer was merely a plain statement of fact, not a prediction and, therefore, squarely protected by section 8(c) of the Act, noting that nothing in the statement itself or the circumstances surrounding its utterance supported the conclusion that it constituted an implicit threat that the employer would automatically throw its employees out of work if it became unionized. Furthermore, they refused to infer, as the administrative law judge and the dissent would have them do, that the employer directly equated unionization with noncompetitiveness and to accept the notion that the employees were incapable of discerning the ordinary meaning of "no longer competitive" or that they were misled because of the employer's failure to explain how a company can become noncompetitive. They also distinguished the line of cases represented by *Patsy Bee*[43] and *Blaser Tool, supra,* which the dissent found controlling, on grounds that, in those cases, the presidents of the companies, in response to employee inquiries about the effects of unionization, sought to establish a direct cause-effect relationship between a union victory in the election and the loss of important business, thereby threatening employees that important customers would no longer do business with the companies if the employees voted for the union. Instead, they determined that the instant case was governed by such cases as *Mission Tire*[44] and *B. F. Goodrich,*[45] where statements discussing noncompetitiveness in connection with unionization alone were found not to be violative of the Act. Accordingly, the panel majority concluded that the employer's remarks, which merely cautioned that its contracts on any of its jobs could be jeopardized if it did not remain competitive, were protected and, therefore, did not violate section 8(a)(1) of the Act.

Member Jenkins, dissenting in part, would have found, in agreement with the administrative law judge, that under existing Board precedent the employer's threat that union representation would result in a loss of jobs was violative of section 8(a)(1) of the Act. He found fully applicable to the instant case the reasoning of the

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[42] Citing *Blaser Tool & Mold Co.,* 196 NLRB 374 (1972), as controlling.

[43] 249 NLRB 976 (1980).

[44] *LeBoe Tire & Rubber Co., d/b/a Mission Tire & Rubber Co.,* 208 NLRB 84 (1974).

[45] *B. F. Goodrich Footwear Co.,* 201 NLRB 353 (1973).

Board's decision in *Patsy Bee, supra,* where a unanimous Board panel reversed an administrative law judge's finding that a statement similar to the employer's statement herein was protected by section 8(c) and found that the employer had "no indication from the union that it would make demands that would cause economic hardship, let alone plant closure." Here, the employer had no indication that the union would make economic demands, resulting in the employer no longer being "competitive," and had no grounds for believing that any of their customers might cancel their contracts. Accordingly, Member Jenkins would find that the employer's statements were "implied threats of job loss and plant closure" made to induce antiunion votes in the Board election. He also asserted that *LeBoe Tire* and *B. F. Goodrich,* on which the majority relied, were of little or no guidance to the decision herein since in both cases the employers conditioned their "predictions" of adverse effects on unit employees on the unions' making economic demands which the companies could not afford. Here, the employer predicted adverse consequences could result from bare unionization and equated unionization with noncompetitiveness, although it made no reference to excessive economic demands. Concluding that the employer's statement hardly could be considered a mere "discussion of production economics," particularly when viewed in context with the employer's many contemporaneous unfair labor practices found herein, Member Jenkins would find that the violation was clearly established.

In the *Broyhill Co.,*[46] a majority of the Board adopted an administrative law judge's conclusion that an employer's posting of a "Notice To Employees" effectively disavowed a supervisor's unlawful statements to employees and obviated the need for additional remedial action. Like the administrative law judge, they emphasized that the notice was posted immediately after the employer learned of the supervisor's conduct; that the notice used statutory language to assure employees that it would not engage in that type of conduct or any other unlawful conduct; that all employees had adequate opportunity to read the notice if they chose to do so; and that the employer "did not in any other manner violate the Act." Accordingly, they agreed with the administrative law judge's conclusion that under the standards set forth in *Passavant Memorial Area Hospital,*[47] 237 NLRB 138 (1978), the notice to employees effectively disavowed a supervisor's unlawful statements and obviated the need for additional remedial action.

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[46] 260 NLRB 1366 (Chairman Van de Water and Members Zimmerman and Hunter; Members Fanning and Jenkins dissenting in part).

[47] 237 NLRB 138 (1978).

In disagreement with the dissenters' conclusion that the employer's notice did not adequately repudiate the unlawful conduct, the majority asserted that the conclusion resulted from a highly technical and mechanical application of the criteria in *Passavant*. They pointed out that, although the dissenters claimed that the notice was not timely because it was posted 5 weeks after the first unfair labor practice, they did not dispute that the employer acted in good faith and lacked knowledge of the supervisor's conduct until the day before it posted the notice. Additionally, the majority observed that here the notice was posted within 5 weeks of the commission of the unfair labor practice, and that in litigated cases, Board notices are never posted within 5 weeks of the commission of the unfair labor practice. As to the dissenters' implied contention that employees other than the three who testified might not have had the opportunity to see the notice, they concluded this was a pure speculation inasmuch as the notice was posted on a company bulletin board. Finally, in response to the dissent's claim that the notice was not "sufficiently specific" because it failed to name the supervisor or mention the circumstances of the unlawful statements, the majority found it to be equally without merit since Board notices do not contain such specificity. Accordingly, they determined that the employer's notice adequately repudiated the unlawful conduct of its supervisor since it did all that it reasonably could do to disavow such conduct and that such voluntary employer action should be encouraged.

In their dissent, Members Fanning and Jenkins disagreed with the majority's adoption of the administrative law judge's conclusion that the employer effectively disavowed the conduct of its supervisor. In their view, the employer's publication of the notice to employees failed to comport with the standards enunciated in *Passavant, supra*, that the repudiation must be timely, unambiguous, specific, and free from other proscribed conduct. Initially, they asserted that the employer's 5-week delay between the first threat of plant closure and the employer's posting of the notice was sufficient to prevent its attempted disavowal from effectively dissipating the severe impact of the employer's threat to close the plant. Secondly, in their view, the evidence did not establish that the employees had an adequate opportunity to read the notice since the record did not indicate the location of the bulletin board or the duration of the posting and since only 5 of 50 unit employees were called to testify and only 3 stated they had seen the notice. Further, the dissenters pointed out that there was no evidence that the employer made any other effort to communicate its disavowal to employees in the department where the threats occurred. Finally, they asserted that the notice was not sufficiently specific since it did not name the supervisor or mention the circumstances under which the unlawful statements were made and it merely stated that the supervisor "may have acted in an improper manner." They found this deficiency particularly significant with respect to the plant closure threats. Accordingly, they would conclude that the employer's notice had not effectively erased the effects of its supervisor's statements that the employer would close the plant if the union succeeded in organizing the employees and would find that the employer violated section 8(a)(1) of the Act by its threats of plant closure and reprisals if the union succeeded in organizing its employees.[48]

5. Discharge of Supervisors

In *Parker-Robb Chevrolet,*[49] the majority of the Board disagreed with an administrative law judge's finding, based on *Bros. Three Cabinets,*[50] that the employer, "as part of its overall plan to discourage its employees' support of the Union," violated section 8(a)(1) of the Act by discharging a crew chief, an admitted supervisor. Two of the employer's supervisory crew chiefs attended a union organizational meeting during which they learned that they were ineligible for inclusion in the unit. Later that day or the next, one of the supervisors learned of the discharge of two rank-and-file employees and attempted to get an explanation from the used-car sales manager especially since one of the best men the employer had was being fired. He was told that the employer had to cut back. The supervisor located the new-car sales manager who also told him that the employer had to cut back. When the supervisor persisted in demanding an explanation for the discharges, the new-car sales manager told him the employer "was letting him go, too."

In disagreeing with the administrative law judge, the Board majority concluded that the so-called integral part or pattern of conduct line of cases, as typified by *Bros. Three Cabinets, supra,* and cases cited therein, misread the intent of Congress when it amended the Act to exclude specifically "any individual employed as a supervisor" from the definition of the term "employee." Accordingly, the majority overruled *Bros. Three Cabinets,* and similar cases inconsistent with the decision herein.

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[48] In answer to the majority argument that the employer's notice would be as efficacious as the Board's notice, the dissenters pointed out that the Board notice is posted by an agency of the U.S. Government and in compliance with a Board order, is monitored by the Government and must remain posted for 60 days, so as to enhance the relative effectiveness of the Board's notice in mitigating the impact of the employer's coercive conduct.

[49] 262 NLRB 402 (Chairman Van de Water and Members Fanning, Zimmerman, and Hunter; Member Jenkins concurring).

[50] *DRW Corps. d/b/a/ Bros. Three Cabinets,* 248 NLRB 828 (1980) (Member Jenkins and then Member Penello; then Member Truesdale concurring in part and dissenting in part).

The majority noted that notwithstanding the general exclusion of supervisors from the coverage of the Act, the discharge of a supervisor may violate section 8(a)(1) in certain circumstances.[51] The protection afforded supervisors in these circumstances stemmed not from any statutory protection inuring to them, but rather from the need to vindicate employees' exercise of their section 7 rights. However, since, in the majority's view, the integral part or pattern of conduct line of cases unduly extended those circumstances when a supervisor's discharge may violate section 8(a)(1), they concluded that the integral part or pattern of conduct line of cases had produced inconsistent decisions which could not be reconciled with the statute so that all concerned had no clear guidelines as to when supervisors might be lawfully discharged.

The majority noted that the confusion in this area stemmed from the extension of the rationale in the seminal *Pioneer* case [52] and they pointed to a number of decisions,[53] in which the Board had suggested that employer motivation in discharging a supervisor controlled. While finding that supervisors must be protected in certain situations,[54] they also recognized that the discharge of a supervisor for engaging in union or concerted activity almost invariably has a secondary or incidental effect on employees. This effect on the employees, the majority found, was insufficient to warrant an exception to the general statutory provision excluding supervisors from the protection of the Act when a supervisor is discharged either because he or she engaged in union or concerted activity or because the discharge was contemporaneous with the unlawful discharge of statutory employees, or both. Thus, no matter what the employer's subjective hope or expectation, that circumstance could not change the character of its otherwise lawful discharge.

Accordingly, the Board majority set forth the following analysis under which all supervisory discharge cases may be resolved: The discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under section 7 of the Act, as when they give testimony adverse to their employer's interest or when they refuse to commit unfair labor practices; however, the discharge of supervisors as a result of their participation in union or concerted activity—either by themselves or when allied with rank-and-file employees—is *not* unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act. Applying this test to the instant case, the majority determined that they were unable to conclude that the discharge of the crew supervisor interfered with the right of employees to exercise their section 7 rights or that his reinstatement was necessary to convey to employees the extent to which the Act protects these rights.

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[51] Thus, they noted that an employer may not lawfully discharge a supervisor for (1) giving testimony adverse to an employer's interest at either an NLRB proceeding or during the processing of an employer's grievance under the collective-bargaining agreement; (2) refusing to commit unfair labor practices, or (3) failing to prevent unionization.

[52] *Pioneer Drilling Co.*, 162 NLRB 918 (1967), enfd. in pertinent part 391 F.2d 961, 962-963 (10th Cir. 1968).

[53] *Sheraton Puerto Rico Corp., d/b/a Puerto Rico Sheraton Hotel*, 248 NLRB 867 (1980), reversed 651 F.2d 49 (1st Cir. 1981); *Nevis Industries, d/b/a Fresno Townhouse*, 246 NLRB 1053 (1979), reversed 647 F.2d 905 (9th Cir. 1981); *Stop & Go Foods*, 246 NLRB 1076 (1980); *Downslope Industries*, 246 NLRB 948 (1980).

[54] See fn. 51, *supra*.

While he agreed with the majority's findings and conclusions, Member Jenkins disagreed with the majority's overruling of the integral part or pattern of conduct line of cases, established Board precedent for over 15 years, and with their rationale for finding the supervisor's discharge lawful under the Act. He also could not join in what he viewed as the majority's apparent findings that the supervisor's discharge was part of the employer's plan to interfere with its employees' section 7 rights but that, since the employee was a supervisor, such interference did not violate section 8(a)(1), overruling *Bros. Three* and similar cases. However, observing that proceedings alleging that a supervisor's discharge was violative of section 8(a)(1) under the integral or pattern of conduct theory, must show that the discharge was contemporaneous with or close in time to an employer's discriminatory treatment of its employees, *and* that the action taken against the supervisor was in reprisal for the supervisor's participation in or support of the employer's actions, Member Jenkins concluded that the record in the instant case did not lend itself to an inference of proscribed employer motivation. Accordingly, he found, in agreement with the majority, that the supervisor's discharge was not violative of section 8(a)(1) of the Act.

However, he vigorously disagreed with the majority's decision to overrule that line of cases, typified by *Bros. Three, supra,* as being overly hasty and ill-advised. Member Jenkins argued that the majority reaffirmed that, in some situations, the Board and courts have found discharges of supervisory personnel violative of section 8(a)(1), as encroachments of employees' section 7 rights, but that they, by terming the integral part or pattern of conduct line of cases an undue extension of this principle, chose to abandon the doctrine *in toto.* He thus refused to join the majority in their abdication of the Board's primary obligation to protect employees from such coercion. Member Jenkins also found, without merit, the majority's assertion, that reliance on an employer's motivation in discharging a supervisor was "both unworkable and contrary" to the Board's objective approach in analogous cases. He asserted that in most cases involving discriminatory actions, an element of the General Counsel's *prima facie* case is a finding that the employer's action was compelled by a proscribed motive and by determining that motivation was irrelevant in supervisory discharge cases, the majority, in Member Jenkins' view, were making the same error made by then Members Murphy and Truesdale in their partial dissent in *Nevis.*[55] In *Nevis,* the majority explained that the dissenters failed to consider the teachings of *N.L.R.B.* v. *John Brown, d/b/a Brown Food Stores,*[56] where the Supreme Court held that a determination of the legality of employer conduct which could interfere with employee rights, but which could also have a legitimate business purpose, depended, first, on an evaluation of the employer's motive in engaging therein. Finally, Member Jenkins argued that the cases relied on by the majority to support the abandonment of any consideration of motivation were clearly inapposite. Accordingly, he would not abandon the integral part or pattern of conduct doctrine, which reflected 15 years of Board precedent, although he would find in this case that no violation had been shown under that doctrine.

In *Sahara-Reno,*[57] the General Counsel contended that the layoff of several sous chef employees was unlawful because it was part of the employer's discriminatory layoff of food service employees, and, alternatively, he argued, relying on *Nevis, supra,* that, even if the sous chefs were supervisors, their layoff was an integral part of the employer's pattern of unlawful conduct and that they should be reinstated with the laid-off employees. The record showed that several of the sous chefs were heavily involved in organizing an employee protest and in presenting the employees' grievances to management.

Although concluding that the sous chefs were supervisors rather than employees, the Board found no merit to the General Counsel's alternative theory. It pointed out that in the recent *Parker-Robb, supra,* decision, the Board had held that the protection of the Act did not extend to supervisors who are disciplined or discharged as a result of their participation in union or concerted activity and had explicitly overruled *Fresno Townhouse, supra,* and similar cases to the extent that they held that a violation was established when the discharge of a supervisor was an integral part of an employer's pattern of unfair labor practices against employees. Accordingly, the Board concluded that, for the reasons set forth in *Parker-Robb,* there was no basis for finding these supervisory layoffs unlawful.

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[55] *Nevis Industries, d/b/a Fresno Townhouse,* 246 NLRB 1053 (1979).

[56] 386 U.S. 278 (1975).

[57] *Sahara-Reno Corp. d/b/a Sahara Reno,* 262 NLRB 824 (Chairman Van de Water, Members Fanning, Zimmerman, and Hunter).

In *Roma Baking Co.,*[58] the administrative law judge found that the employer violated section 8(a)(1) of the Act by discharging a supervisor because such conduct was part of the employer's program of coercing its employees. The supervisor was the initiator and the most vigorous proponent of the union activity at the employer's facility. On May 24 he became ill and on May 26 his wife telephoned the employer to report his absence. Because of illness, he did not report for work for a week. Although his wife reported his illness and he did so after a doctor's appointment, he was told by the employer's manager, when he returned to the employer's facility to pick up his check, that "as far as I'm concerned, you quit." The Board pointed out that its recent decision in *Parker-Robb, supra,* had held that the protection of the Act did not extend to supervisors who were disciplined or discharged for their participation in union or concerted activity and had overruled *Bros. Three,* on which the administrative law judge relied in finding the discharge unlawful, and similar cases to the extent that they held that a violation is established when the discipline or discharge of a supervisor is an integral part of an employer's pattern of unlawful conduct directed against employees. Accordingly, the Board concluded, for the reasons set forth in *Parker-Robb, supra,* that there was no basis for finding the discharge of the supervisor to be unlawful.

Member Jenkins separately concurred with the dismissal of the complaint with respect to the supervisor, but did so for the reason that no violation had been shown under the integral part or pattern of conduct doctrine, referring to his concerning opinion in *Parker-Robb, supra.*

In *Bentley Hedges Travel Service,*[59] an administrative law judge, relying on the Board's decisions in *Nevis, supra,* and *Bros. Three, supra,* found that an employer violated section 8(a)(1) of the Act by discharging a supervisor, who was also a managerial employee, since it was part of a "pattern of conduct" aimed at discouraging the exercise of section 7 rights by employees. The supervisor assisted other rank-and-file employees in the drafting of a letter outlining employee complaints to management and requesting a meeting with the employer. Further, he presented the letter to management on behalf of the employees. He also visited union headquarters with other employees, asked for union assistance, and finally signed a union authorization card. Shortly after the union notified the employer of the names of the signers of authorization cards, the employer's president discharged the supervisor stating "I told you not to get involved with organizing employees and you have gone too far."

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[58] 263 NLRB 24 (Chairman Van de Water and Members Fanning, Zimmerman, and Hunter; Member Jenkins concurring separately).

[59] 263 NLRB 1408 (Chairman Van de Water and Members Fanning, Zimmerman, and Hunter; Member Jenkins dissenting).

In reversing the administrative law judge and finding the discharge lawful, the Board majority relied on the Board's decision in *Parker-Robb, supra*, which held that the protection of the Act does not extend to supervisors discharged or otherwise disciplined for engaging in union or protected activity. In so doing, they noted that its *Parker-Robb* decision overruled *Nevis, supra*, and *Bros. Three, supra*, to the extent those cases held that a violation was established when the discharge of a supervisor is part of a pattern of conduct directed against employees and/or when the discharge is motivated by a desire to thwart employees' section 7 rights. The Board majority further stated that "[s]imilarly, managerial employees are excluded from the protection of the Act [60] and we believe that they, like supervisors, may be discharged or otherwise disciplined for engaging in union or other concerted activity." Accordingly, the managerial employee's discharge was not unlawful.

Member Jenkins dissented. While noting that managerial employees, of course, are excluded from the protection of the Act, he stated that there was no doubt, as the administrative law judge found, that the discharge, following on the heels of the employer's other unlawful conduct, was the principal element in a plan designed to intimidate employees and halt the union movement. Accordingly, for the reasons set forth in his separate concurring opinion in *Parker-Robb, supra*, he would find the discharge violative of section 8(a)(1) of the Act.

In *H. H. Robertson Co.*,[61] the Board panel agreed with the administrative law judge that the employer's discharge of its general foreman, a supervisor, violated section 8(a)(1) of the Act. The employer initially hired the foreman pursuant to the recommendation of the union's business agent. Because the foreman, a union vice president, was an outspoken advocate of changes in the union's internal administration, he earned the enmity of the buisiness agent who tried to persuade the employer to discharge the foreman by calling the front office in an attempt to discredit him and that the pressure was getting so bad that the employer might have to let him go for the good of the company.

One day when the foreman was supervising two groups of employees on an ironworker job, the union steward, after an argument with the foreman, called a work stoppage for the following day. The next day, after only two employees reported for work, the foreman and the business agent reached an agreement to end the work stoppage, but the foreman refused to take the steward back. Later that day, after the employer and the business agent had discussed the problems on the foreman's jobsite, the employer called the foreman and told him to lay off the two employees and recall the steward. The foreman protested the order and complied with it, but wrote "union interference with right to work" as the reasons for the discharges on the two termination slips. Shortly thereafter, he informed the Board's office of the circumstances surrounding the layoffs. The next day, a Board agent contacted the employer to investigate. The employer constructively discharged the foreman 2 days later, by assigning him to a position as a regular crewmember on a job located outside the union's jurisdiction. At the hearing, the employer admitted that his decision to change the foreman's work assignment was motivated by the foreman's call to the Board office; his writing "union interference" on the two termination slips; a belief that the foreman was involved with NLRB charges filed by the two employees; and because it was concerned that the dispute between the foreman and the union agent was affecting the employer's business.

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[60] *N.L.R.B.* v. *Bell Aerospace Co., Div. of Textron*, 416 U.S. 267 (1974).

[61] 263 NLRB 1344 (Chairman Van de Water and Members Fanning and Hunter).

The Board panel determined, in agreement with the administrative law judge, that the employer discharged the foreman in violation of section 8(a)(1) for revealing unfair labor practices and providing related information to the Board and for assisting employees in utilizing the Board's processes. It further found that to the extent that the employer was motivated by the internal union dispute, the enmity between the foreman and the business agent was inextricably intertwined with the foreman's call to the Board, thereby triggering the employer's final action. Accordingly, the Board found that the union restrained and coerced the employer in the selection of its collective-bargaining representative, in violation of section 8(b)(1)(B) of the Act, by attempting to cause and causing the employer to terminate the foreman.

B. Interference with Access to the Board

In *St. Joseph Hospital Corp.*,[62] the Board majority found, contrary to the administrative law judge, that the employer did not violate section 8(a) (4) and (1) of the Act when, pursuant to a contractual provision barring further processing of a grievance once the grievant elected to pursue any available legal or statutory remedy, it refused to process a grievance after the employee filed an unfair labor practice charge with the Board. In thus concluding that the contractual provision was enforceable and noting that under *Gateway Coal*[63] the grievance procedure was a contractual right, the majority found nothing impermissible in a contractual clause which seeks to prevent duplicative adjudication by requiring an election of remedies, especially where the limitation is imposed upon a contractual right rather than on a legal or statutory right. Accordingly, they concluded that the employer was merely adhering to its contractual procedure and was in no way penalizing the grievant for filing a charge with the Board.

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[62] 260 NLRB 691 (Chairman Van de Water and Members Zimmerman and Hunter; Members Fanning and Jenkins concurring in part and dissenting in part).

Dissenting Members Fanning and Jenkins found that the above-noted provision of the parties' collective-bargaining contract was invalid and unenforceable insofar as it sought to place limitations on the employee's statutory right to have full and unimpeded access to the Board. They agreed with the administrative law judge that an employee's right to file an unfair labor practice charge cannot be waived by parties to a contract, that despite a policy favoring deferral to contractual grievance and arbitration provisions, the Board rejected deferral where employees' individual rights are involved, and that such a limitation on contractual rights necessarily and improperly requires an employee to sacrifice a right granted him by contract to obtain a right guaranteed him by law. The dissent further argued that clear Board precedent[64] established that the existence of pending unfair labor practice charges may not be used as the basis for refusing to consider an employee's formal or informal grievance.

In response, the majority stated that the dissent's reliance on *Globe Mfg., supra,* and *ITO, supra,* was clearly misplaced as they were distinguishable from the instant case. In those cases, the refusal to process a grievance was not based on the respondents' reliance on a valid election of remedies contractual clause which waived only an employee's contractual right to process a grievance upon election of statutory or legal relief. Further, they pointed out that in none of those cases was the named respondent acting in accordance with a contractual obligation in refusing to process the grievance, and in two of the cases cited as precedent, the named respondents were clearly in breach of their contractual obligation to process grievances.

C. Employer Bargaining Obligation

1. Recognition of Union Where Competing Claim

In the following two cases, the Board undertook a reevaluation of the *Midwest Piping*[65] doctrine and accordingly set forth new poli-

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[63] *Gateway Coal Co. v. United Mine Workers of America,* 414 U.S. 368 (1974).

[64] *Globe Mfg. Co.,* 229 NLRB 1025 (1977); *Whale Oil Co.,* 169 NLRB 51 (1968); and *ITO Corp. of Rhode Island,* 246 NLRB 810 (1979).

[65] *Midwest Piping & Supply Co.,* 63 NLRB 1060 (1945).

ies with respect to the requirements of employer neutrality in sit-
ations involving competing claims for recognition.

In *Bruckner Nursing Home,*[66] the administrative law judge, rely-
g on *Midwest Piping,* found that, in circumstances where two
val labor organizations, neither of which had filed a representa-
on petition, were engaged in initial organizing attempts, the em-
oyer violated section 8(a)(2) by executing a collective-bargaining
reement with the union, which possessed a majority of authoriza-
on cards, in the face of a "real question" concerning representa-
on which had not been settled by the special procedures of the
t. In so concluding, he found that the rival union's continued at-
mpts to organize employees and its possession of several employ-
authorization cards constituted a "colorable claim" to represen-
ion of unit employees.

n the instant case, the Board majority pointed out that in *Mid-*
st Piping the Board had found that an employer gave unlawful
istance to a labor organization when it recognized one of two
npeting labor organizations, both of which had filed representa-
n petitions and had concluded that employers presented with
al claims from competing unions, where representation petitions
l been filed, should follow a course of strict neutrality until such
e as the "real question concerning representation" had been re-
ved through Board processes. In subsequent *Midwest Piping*
es, the Board eliminated the requirement that a representation
ition actually be filed as a prerequisite to a finding of a "real"
"genuine" question concerning representation, in acknowledg-
it of the need to recognize a rival union contest even prior to
ocation of Board procedures so as to ensure the availability of
procedures and to prevent the serious possibility of employer
se when no petition had been filed. It thus required an election
never two or more unions possessed some support or organiza-
al interest in the unit sought, and defined such interest as a
orable claim" or a claim not "clearly unsupportable" or
ked." This modification of the doctrine, however, presented ad-
nal difficulties in defining precisely the terms "naked claim,"
arely unsupportable claim," or "unsupportable colorable
n," thereby providing an opportunity for a minority union to
tall recognition of its rival majority union. Also, many of the
it courts of appeals refused to enforce many of the Board deci-
based on this modified *Midwest Piping* doctrine.

ter the review of the Board's experience with *Midwest Piping*
with a desire to accommodate the views of the courts, and to

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oraham Grossman d/b/a Bruckner Nursing Home, 262 NLRB 955 (Chairman Van de
and Members Fanning, Zimmerman, and Hunter; Member Jenkins concurring).

protect employees' freedom of choice of a bargaining representative and encourage collective bargaining, the majority determined that it would no longer find 8(a)(2) violations in rival organizing situations when an employer recognizes a labor organization which has an uncoerced and unassisted majority, before a petition has been filed. They also noted that a union's failure actually to possess such a majority would still render the employer liable under section 8(a)(2). The majority further stated that an employer must refrain from recognizing any union once notified of a valid petition, pointing out that in making filing of the petition the operative event for imposition of the strict neutrality requirement in rival union initial organizing situations, they have set forth a rule of conduct that no longer permits a union lacking even support of 30 percent of the unit to forestall the employer's recognition of a rival majority union and thereby frustrate the establishment of a collective-bargaining relationship. Likewise, an employer will no longer have to guess whether a "real question concerning representation" has been raised and may recognize a labor organization unless it has notice of a properly filed petition. In that case, the employer would be prohibited from recognizing any of the competing unions for the limited period the representation petition is in process, thereby preserving employee free choice and striking a balance between the use of authorization cards and Board election procedures in resolving representation questions. In addition to avoiding potential undue influence by an employer, this new approach provides a satisfactory answer to problems created by the execution of dual authorization cards and is consistent with the judicial acceptance of authorization cards as at least one reliable indicator of employee sentiment.

In summary, the majority stated that "under our new formulation, the duty of strict employer neutrality and the necessity for a Board-conducted election attach only when a properly supported petition has been filed by one or more of the competing labor organizations. Where no petition has been filed, an employer will be free to grant recognition to a labor organization with an uncoerced majority, so long as it does not render assistance of the type which would otherwise violate section 8(a)(2) of the Act."

In applying the above principles in the instant case, the majority, contrary to the administrative law judge, dismissed the complaint in its entirety inasmuch as no petition was filed by either of the rival unions and as the employer recognized a labor organization with an uncoerced, unassisted majority.

Member Jenkins concurred in the dismissal of the complaint because the union did not possess the requisite showing of interest to

raise a question concerning representation and because of the lack
of evidence that a minority union was recognized. He also noted
that in a companion case, *RCA del Caribe,*[67] discussed *infra,* he
proposed a requirement of 15 percent as a showing of substantial
support necessary to raise a genuine question concerning represen-
ation in a two-union situation.

In *RCA del Caribe, supra,* the companion case to *Bruckner Nurs-*
ng Home, supra, the Board majority reexamined the *Midwest*
Piping, supra, doctrine with respect to situations where an incum-
ent union is challenged by an "outside" union. The Board had ini-
ally held that continued negotiation of a contract after the filing
f a valid election petition by another union was not a violation of
ection 8(a)(2) within the meaning of *Midwest Piping.*[68] However,
Shea Chemical Corp.,[69] the Board reversed itself, holding that
n employer, faced with a pending petition from an outside union,
ust cease bargaining with the incumbent union and maintain a
osture of strict neutrality with respect to both unions until such
me as one or the other had been certified, so as to ensure employ-
s the greatest possible freedom in the selection of a collective-bar-
ining representative. However, the Board majority herein ac-
owledged that the Board's efforts to promote employee free
oice has been at a price to stability in bargaining relationships,
rticularly as the *Shea Chemical* adaptation of *Midwest Piping*
s failed to accord incumbency the advantages, including the pre-
nption of majority status, which in nonrival situations, the
ard has encouraged in the interest of industrial stability. The
jority concluded that requiring an employer to withdraw from
gaining with an incumbent union after a petition has been filed
ot the best means of assuring employer neutrality, thereby fa-
ating free choice. Unlike initial organizing situations, an em-
er in an existing collective-bargaining relationship cannot ob-
e strict neutrality. Thus, continued negotiation may be per-
ed by employees as support for the incumbent, while withdraw-
om negotiation may signal repudiation. Further, the employer
be faced with economic circumstances that may require imme-
e response and commensurate changes in working conditions,
ng the pendency of the representation proceeding. In all these
mstances, the Board majority determined that preservation of
tatus quo by continued bargaining with the incumbent union
e better way to approximate employer neutrality so that the
filing of a representation petition by an outside, challenging

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2 NLRB 963 (Members Fanning, Zimmerman, and Hunter; Chairman Van de Water and
r Jenkins dissenting).
lliam D. Gibson Co., Div. of Associated Spring Corp., 110 NLRB 660 (1954).
NLRB 1027 (1958).

union will no longer require or permit an employer to withdraw from bargaining or executing a contract with an incumbent.[70]

Applying these principles to the instant case, the Board majority found that the employer's continued negotiation and execution of a contract with the incumbent union, while a valid representation petition was pending, were not violative of the Act.

In his dissent, Chairman Van de Water stated that he would adhere to the *Midwest Piping* doctrine and find that the employer violated section 8(a)(2) of the Act, noting that, for reasons set forth in *Bruckner Nursing Home, supra,* he would treat the filing of a petition as the operative event triggering the requirement of employer neutrality both in incumbent and initial organizing situations. In so doing, the Chairman emphasized employee free choice in the selection of a bargaining representative, disagreeing with the majority that stability of labor relations is undermined and bargaining relationships are disrupted in the application of the *Midwest Piping* doctrine. He noted that the majority failed to consider the statutory mandate that a Board election be the sole forum resolving the question concerning representation raised by petitioner. Further, Chairman Van de Water pointed out that the Supreme Court, in *Linden Lumber,*[71] characterized as minimal any delay pending resolution of the representation issues by election—a delay which did not prejudice either party and was compatible with a goal of stable industrial relations. He pointed out that, under the new standard, an employer would have the obvious ability to influence emplyees in their choice of a bargaining representative. Thus, recognition affords the incumbent union the advantage of a deceptive cloak of authority which can be used to elicit additional employee support. The employer, if it wished to displace the incumbent union, could engage in lawful hard bargaining or unlawful surface bargaining to cause disenchantment with the incumbent union. On the other hand, if the employer wished to retain the current union relationship, it could give up past hard bargaining in favor of longer term gain. Accordingly, in the Chairman's view, the new standard places the employer in a position to maneuver employee sentiments. In addition, there are practical considerations for an employer who doubts an incumbent's majority status and who does not have a preference between the competing unions. The employer may hesitate to conclude a contract with an incumbent for fear of later learning that it must bargain with another union, and thereby risk lengthy and costly 8(a)(5) litigation. Finally, while the Chairman agrees with the doctrine of presumed majority where there are no challenges to an incumbent's status, he sees no reason not to impose a requirement of neutrality in a situation involving more than one union where the incumbent union already enjoys a visibility and accessibility not available to challengers.

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[70] In so concluding, they pointed out that the new rule does not insulate the incumbent union from outside challenges but, in the event of a timely filed petition, will require it to demonstrate its continued majority status, while permitting it to retain its earned right to demonstrate its effectiveness at the bargaining table.

[71] *Linden Lumber Div., Summer & Co.* v. *NLRB,* 419 U.S. 301, 307 (1974).

Dissenting Member Jenkins, like the Chairman, disagreed with the majority's needless reversal of *Midwest Piping*. He argued that the policy set forth by the majority will enlarge an employer's potential for influencing representation elections, exploiting the differing self-interests of unions and employees and dictating the terms of preelection collective-bargaining agreements. While sharing the majority's concern for unsuccessful enforcement efforts,[72] he disagreed with the majority's overhaul of *Midwest Piping*, stating that the basic weaknesses of *Midwest Piping* stemmed from the Board's failure to define what was required by way of a showing of employee interest to warrant raising a question of representation. Accordingly, he proposed that a 15-percent showing of employee support for a rival union, rather than mere minimal support, serve as the requirement for holding an election, arguing that an expedited election before bargaining occurs would more quickly resolve the issue of free employee choice, undercut the propensity to violate the neutrality requirements, and perhaps reduce the frequency of unfair labor practices such as the instant one.

In *Dresser Industries*,[73] the Board majority overruled *Telautograph Corp.*[74] and agreed with the administrative law judge, but for different reasons, that the employer violated section 8(a)(5) and (1) of the Act by refusing to bargain with an incumbent union following filing of a decertification petition In so doing, the majority referred to its reevaluation of the *Shea Chemical*[75] rule in *RCA del Caribe, supra,* where they determined that the application of *Shea Chemical* failed to give appropriate weight to an incumbent union's presumption of majority status and did not afford the best means of ensuring employer neutrality. The majority concluded that the same considerations which led to the overruling of *Shea*

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[72] The majority noted the employer's defense was based in part on circuit court decisions rejecting the Board's *Midwest Piping* doctrine. See also discussion of *Midwest Piping* in *Bruckner Nursing Home, supra.*

[73] 264 NLRB 1088 (Members Fanning and Zimmerman; Member Jenkins concurring; Chairman Van de Water dissenting).

[74] 199 NLRB 892 (1972). The *Shea Chemical* rule by which an employer was not obligated to bargain with an incumbent union pending resolution of issues raised by the filing of an election petition, and the *Telautograph* rule which permitted an employer to refuse to bargain with an incumbent union pending resolution of representation questions raised by the filing of a decertification petition represented limited exceptions to the usual bargaining obligations governing a collective-bargaining relationship. Under these rules, designed to ensure strict employer neutrality and to facilitate employee free choice, an employer could properly suspend bargaining with an incumbent union even in the absence of a reasonable doubt, based on objective considerations, of majority status.

[75] *Shea Chemical Corp.*, 121 NLRB 1027 (1958).

Chemical in *RCA del Caribe* mandated the overruling of *Telautograph* and in their view a rule permitting an employer to withdraw from bargaining solely because a decertification petition has been filed does not give due weight to the incumbent union's continuing presumption of majority status and is not the best way to achieve employer neutrality in the election. The majority, accordingly, held that the mere filing of a decertification petition no longer requires or permits an employer to withdraw from bargaining or executing a contract with an incumbent union. In concurring with the majority, Member Jenkins did not rely wholly on *RCA del Caribe*, but rather cited his separate opinion in *Telautograph* in which he adopted the findings of the administrative law judge that a showing of special circumstances merited dismissal of the 8(a) (5) and (1) allegation in that case.

Chairman Van de Water, dissenting, indicated his adherence to the rule set forth in *Midwest Piping, Shea Chemical, and Telautograph, supra.* He noted that the majority completed their "abandonment" (begun in *RCA del Caribe*) of a principle designed to protect the right of employees to choose freely whether to be represented or unrepresented by a union. He further stated that in allowing an employer to continue collective bargaining with an incumbent union during the pendency of a decertification petition would permit employees' choice of a bargaining representative to be influenced improperly, thereby frustrating employee free choice. Finally, he argued that employee free choice could better be served by the principle of employer neutrality as defined by *Midwest Piping* and he suggested that expedited election procedures could determine the legal representative within 30 days.

2. Duty To Furnish Information

Section 8(d) defines the obligation to "bargain collectively" imposed by the Act as requiring that bargaining be carried on in "good faith." The statutory duty of an employer and a bargaining representative to bargain in good faith has been interpreted to include the duty to supply information which is "relevant and necessary" to the intelligent performance of the collective-bargaining duty in contract administration functions. The scope of this obligation was considered by the Board this past year in a number of cases.

In the four cases decided in the report year involving an employer's duty to provide information, requested by the collective-bargaining representative, the Board established the respective rights and obligations of the parties for the disclosure of health and safety information, asserted to be confidential. In so doing, the Board recognized that the Supreme Court's decision in *Detroit*

Edison Co.[76] required it to balance a union's need for such information against any "legitimate and substantial" confidentiality interests established by the employer, accommodating the parties' respective interests insofar as feasible in determining the employer's duty to supply the information.

In *Minnesota Mining & Mfg. Co.,*[77] the information sought by two local unions[78] was of two general types (1) the employer's affirmative action plans (AAPs), and (2) health and safety related data, including (a) employee morbidity and mortality statistics; (b) generic names of all substances used and produced at the plant; (c) results of employee clinical and laboratory studies of employees undertaken by the employer; (d) health information derived from employee insurance plans and workmen's compensation plans; (e) a listing of contaminants monitored by the employer; (f) details of the employer's hearing conservation program; (g) plant sources of radiation and a listing of radiation incidents; and (h) a listing of plant areas exceeding Federal heat standards and an outline of its program to prevent heat disease. The employer refused to supply any of the requested information, contending that the AAPs were both confidential and not negotiable and that regular safety meetings held pursuant to the contract provided all information necessary for an assessment of the health and safety issues.

Relying in part on the fact that the employer and the unions were codefendants in a pending employment discrimination suit, the administrative law judge found the AAP information relevant to the unions' collective-bargaining duties, and, hence, concluded that the employer's failure to provide the requested AAP information violated section 8(a) (5) and (1) of the Act. The Board majority reversed, finding that the information was not presumptively relevant [79] and that the union had not demonstrated the relevance of the entire AAPs nor specified which portions may be deemed relevant.[80]

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[76] 440 U.S. 301 (1979).

[77] 261 NLRB 27 (Chairman Van de Water and Members Fanning and Zimmerman; Member Hunter concurring; Member Jenkins concurring in part and dissenting in part).

[78] The information was requested by two locals, one of which additionally requested the health and safety information.

[79] In so finding, the majority relied on *Westinghouse Electric Corp.*, 239 NLRB 106 (1978), enfd. and modified on other grounds 648 F.2d 18 (D.C. Cir. 1980), where the Board found that, except for certain statistical data contained in the "Work Force Analysis" of an AAP, AAPs are not presumptively relevant. Chairman Van de Water would not find the furnishing of the "Work Force Analysis" presumptively appropriate except in situations where a union refers a substantial number of individuals for hire, e.g., in the construction industry, and thereby becomes involved in the hiring process, and is faced with a legal nondiscrimination duty. With respect to the balance of an AAP, he would not require such information to be furnished, for the reasons set forth in former Member Murphy's dissent in *Westinghouse, supra,* at 122-124. Member Hunter concurred with this position.

[80] The majority also pointed out that the information deemed relevant to defense of the lawsuit may be obtained through other methods, such as discovery.

The majority, however, agreed with the administrative law judge that the health and safety information was relevant and necessary to the bargaining representative's function and found that the union was entitled to full disclosure to the extent consonant with the protection of individual employees' privacy rights and with the employer's legitimate proprietary confidentiality concerns. In so doing, the majority, observing that caustic, carcinogenic sterilization agents and other hazardous substances were regularly used or produced at the plant, found that the work environment had actual or potential dangers to employees and that the union's need for the information was not merely speculative, but represented a legitimate concern for the employees it represented. While finding the requested information both relevant and reasonably necessary for the union to negotiate meaningfully, the Board also acknowledged the existence of the employer's legitimate concerns raised in its defenses regarding the confidentiality of employee medical records and of trade secrets which would be revealed if the generic names of substances used by the employer were supplied, and the need to balance the parties competing interests as enunciated by the Supreme Court in *Detroit Edison, supra.*

In making the appropriate balancing accommodation, the Board majority adopted the administrative law judge's finding of an 8(a)(5) violation in the failure to furnish the requested employee health and medical information, to the extent that the information did not include individual medical records from which identifying data had not been removed. They also determined that, in the event that providing statistical data may result in the "unavoidable identification" of some individual employees, the union's need for the medical data potentially revealing past effects of the workplace on employees outweighed any "minimal intrusion upon employee privacy implicit in the supplying of aggregate data sought."

With respect to the trade secret defense, the majority then found that the employer, with its blanket refusal to supply the generic names of any of the substances, did not substantiate its claim that the disclosure of the information would impinge on its proprietary interests. As to the vast majority of the materials sought, the employer, in effect, conceded that their disclosure would not damage its competitive position. Accordingly, the trade secret defense was not relevant and therefore no adequate defense was raised.[81] In concluding that the employer violated section 8(a) (5) and (1) of the Act in failing to furnish such information, the majority further ordered the employer to bargain with the union over the disclosure of information to which it asserts a trade secret defense. However, in view of the long and apparently amicable bargaining relationship of the parties, they decided not to engage in the full balancing of countervailing rights discussed by the Supreme Court in *Detroit Edison, supra,* before first affording the parties an opportunity to reach an accommodation on their own.

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[81] Citing *Fawcett Printing Corp.*, 201 NLRB 964 (1973).

Concurring Member Hunter agreed with the majority that the employer's refusal to supply the union with the affirmative action plans was lawful and that its blanket refusal of health and safety information violated the Act. He emphasized that the employer would not be required to release the medical records of individual employees, but rather statistical or aggregate medical data from which individual information has been excised.[82] In joining the majority in holding that the employer must disclose information concerning which it raised no trade secret defense, Member Hunter also emphasized the conditional nature of the employer's duty to disclose information where it raises a trade secret defense and claims a legitimate concern and the requirement that the Board be vigilant to protect the right of the union to the information as well as the equally legitimate proprietary concerns of the employer.

Member Jenkins, concurring in part and dissenting in part, would not require the employer unconditionally to furnish the information claimed to be confidential—generic names of substances used and produced—unless, as here, the information was found to have been relevant. He would leave to the parties to determine between themselves how the union's right of access may be accommodated to the employer's proper concern not to have confidential business information revealed to competitors. Further, with respect to the affirmative action plan, Member Jenkins found, upon reexamination of *Westinghouse Electric, supra,* that the distinction made there between the statistical data and other portions of an AAP was invalid and would find that AAPs are presumptively relevant to the union's role as collective-bargaining representatives. He pointed out that, as bargaining representative of employees, a union has a vital interest in the commitments which affect the employer's personnel policies and a need to know of these commitments not only to police its contract, but also to suggest alternative causes of action and for further negotiation. Accordingly, Member Jenkins would find that the union was entitled to the affirmative action plan except that the employer's "business forecast" and items relating to employees outside the unit may be deleted.

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[82] Pointing out that the majority's suggestion that the union's need for the information outweighed any "minimal intrusion upon employee privacy" may well be at odds with *Detroit Edison, supra,* he concluded that he did not need to reach that issue.

In *Borden Chemical, a Div. of Borden,*[83] the administrative law judge found that the employer's refusal to provide the union with a requested list of raw materials and chemicals purchased, stored, or processed at its plant violated section 8(a)(5) and (1) of the Act, despite his finding that certain of the information was of a confidential, proprietary, and trade secret nature. The Board majority agreed with the administrative law judge that the information was relevant, but disagreed that the employer was required to provide all information irrespective of its proprietary, confidential, or trade secret nature. In so doing, they recognized that the employer's asserted defense appeared to raise, at least on its face, legitimate and substantial employer interests which possibly required a finding that the employer need not disclose or at least not unconditionally disclose, all requested information. In addition, the majority rejected the employer's contention that because the list contained some highly proprietary and trade secret material, disclosure of the entire list was privileged. Accordingly, the majority determined and ordered the employer to furnish the union with the requested information to the extent that no adequate trade secret defense was raised. In accord with the decision and procedure set forth in *Minnesota Mining, supra,* the majority ordered the parties to bargain with respect to disclosure of information for which the employer asserted a confidentiality defense, noting that if the parties are unable to reach an agreement on a method of disclosure satisfactorily protecting their interests, the Board may be required at a later time to determine whether the parties had bargained in good faith and to undertake the balancing of legitimate competing interests, following the principles in *Detroit Edison Co., supra.*

Member Hunter concurred with the majority decision consistent with the views expressed in his separate opinion in *Minnesota Mining, supra.*

Member Jenkins, concurring in part and dissenting in part, would require the employer to provide the union with a complete list of materials and chemicals purchased, stored, or processed at the employer's plant in accordance with his separate opinion in *Minnesota Mining, supra.*

In *Colgate-Palmolive Co.,*[84] a union's request for health and safety information virtually identical to that which was the subject of the Board's findings in *Minnesota Mining* was denied by the employer on the grounds, *inter alia,* that the information was too burdensome, time-consuming, or costly to produce, that the union was engaged in a "fishing expedition," and that any problems could be resolved by discussion of health and safety concerns. The Board majority adopted the administrative law judge's conclusion that the employer's refusal to provide certain of the requested health and safety information which was not confidential and which was relevant to the union's representational functions violated section 8(a)(5) and (1) of the Act.[85] However, contrary to the administrative law judge, the majority found that the employer was not relieved of its obligation to furnish the requested information which it claimed was too burdensome, expensive, and time-consuming to compile. They concluded that the employer had not established its claim that the request was too burdensome, finding that the record showed no verification of the employer's cost estimates and characterizing certain of the employer's estimates as exaggerations. The majority also observed that the employer failed to ask the union to clarify its request so as to possibly eliminate some of the information requested; apprise the union of the extent of the problems in complying with the request; or ask that the union help defray costs of compliance.[86] Further, while acknowledging the administrative law judge's concern for employee privacy and confidentiality of medical records, the majority found that the employer was obligated to produce employee medical records from which all identifying data had been excised, noting that the record showed that the union had not sought individually identified records and that the union had suggested a "coded form" which eliminated the employer's confidentiality concerns. In this respect, the majority found that, even in circumstances where production of medical records resulted in the "unavoidable identification" of individual employee medical information, the union's need for such information outweighed the "minimal intrusion upon employee privacy implicit in the supplying of aggregate data" sought. Finally, the Board agreed with the administrative law judge that the employer was not obligated to furnish information as to which it asserted a trade secret defense and that such was a matter for resolution through collective bargaining.

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[83] 261 NLRB 64 (Chairman Van de Water and Members Fanning and Zimmerman; Member Hunter concurring; Member Jenkins concurring in part and dissenting in part).

[84] 261 NLRB 90 (Chairman Van de Water and Members Fanning and Zimmerman; Member Hunter concurring; Member Jenkins concurring in part and dissenting in part).

In so doing, the majority followed its decision in *Minnesota Mining, supra,* and did not undertake a balancing of the parties' competing interest but left it first to collective bargaining between the parties. In the event an agreement was not reached, the Board would subsequently examine the parties' bargaining conduct and would balance the interests of the competing parties as envisioned by the Supreme Court in *Detroit Edison, supra*.

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[85] The administrative law judge also found that the employer was not required to supply certain requested information prepared for use by the Occupational Safety and Health Administration and other types of survey data to which it asserted a trade secret defense, which involved confidential employee information not authorized to be released by the individual employee, or which was too burdensome to produce.

[86] The majority found that, if costs were truly substantial, the parties would be required to bargain collectively in order to allocate the costs. It further stated that, if no agreement as to cost allocation could be reached, the union was entitled, to the extent governed by this decision, to access to the records in order to compile the information contained therein.

Member Hunter concurred in the decision to the extent consistent with his views discussed in his separate opinion in *Minnesota Mining, supra*.

Member Jenkins, concurring in part and dissenting in part, agreed with the majority's findings except that he would order the employer to furnish the generic names of all substances as requested and require the parties to determine how the union's right of access to the information may be accommodated to the employer's business concerns, as discussed in his separate opinion in *Minnesota Mining, supra*.

In *Plough*,[87] the administrative law judge found that the employer's refusal to provide the union with a list of chemicals, by their generic or trade names, together with any hazardous warnings or instructions involving them, violated section 8(a)(5) and (1) of the Act because the information was clearly relevant and necessary to the union's representational functions and the employer had not substantiated its defense that the information contained data of a confidential, proprietary, and/or trade secret nature. However, he concluded that the employer properly refused to honor the request to provide the results of all employee physicals, finding merit in the employer's contention that the concern over the confidentiality of medical records outweighed the potential benefit to the union. He further found that this information would lose much of its value if all identifying data were deleted and that the employer had been providing the union with a summary of occupational illnesses as set out on an OSHA form, which would tend to serve the same purpose as the requested information. While agreeing with the administrative law judge's finding of a violation,[88] the panel, in accord with *Minnesota Mining, supra*, and its two companion cases, *Borden Chemical, supra*, and *Colgate-Palmolive, supra*, revised his order to require the employer to turn over to the union not only the requested chemical information concerning which it failed to assert a trade secret defense, but also the requested warnings or instructions associated with the chemical substances.[89] However, with respect to the chemical materials claimed to constitute confidential trade secret information, the panel ordered the parties to bargain so as to reach an agreement regarding the disclosure of the information which best accommodates their competing legitimate interests, noting, as it did in *Minnesota Mining, supra,* that failure to reach an agreement may require Board examination of their bargaining conduct and balancing of their interests, pursuant to the principles set forth in *Detroit Edison, supra.*

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[87] 262 NLRB 1095 (Chairman Van de Water and Members Fanning and Hunter).

[88] The Board panel adopted without comment the administrative law judge's finding of no merit in the employer's claim that the union had, under the collective-bargaining agreement, waived its right to all of the requested information or that it would be too burdensome or costly for the employer to produce the requested information.

[89] The panel found the requested list of chemicals herein was similar to that requested and found relevant and necessary in *Minnesota Mining, supra*.

With respect to the issue of confidentiality of medical information concerning results of physicals, the panel recognized, as it did in *Minnesota Mining, supra,* that the employer had a legitimate and substantial interest in ensuring that the release of medical information concerning physicals did not violate the physician-patient privilege or the confidentiality of individual employee medical reports. Accordingly, contrary to the administrative law judge, it ordered the employer to furnish the union with medical records of the physicals to the extent that the information did not include individual medical records from which the identifying data had not been removed. In so doing, the panel disagreed with the administrative law judge's finding that the medical data would lose much of its value if all identification were removed, observing that this was a judgment best made, not by the Board, but by the requesting party.

Finding that information concerning costs of truck maintenance and repair was relevant to a grievance concerning the reinstatement rights of drivers who had been laid off because of a decrease in the number of the employer's trucks, the Board panel in *Conrock Co.*[90] reversed an administrative law judge and concluded that the employer had violated section 8(a)(5) and (1) of the Act when it refused the union's request for such information. In so doing, the panel rejected his finding that the information was not relevant because the employer, who, at the initial grievance meeting, had claimed costs as a determining factor in its decision to retire the number of it trucks, later stated that it would not so contend at an arbitration proceeding, but rather would claim that the trucks were retired in accordance with its policy regarding obsolete equipment. Noting that the employer initially had maintained that the trucks were "too costly to operate," and that the parties' collective-bargaining agreement contained a job-protection clause concerning permissible subcontracting which, by its terms, also allowed the employer to determine the extent to which it would replace equipment that had become too costly to operate, the panel found that information regarding truck repair was relevant for the purpose of evaluating the propriety of the employer's decision. It further concluded that "relevant information cannot be rendered irrelevant" by an employer's promise not to raise a particular defense at arbitration, since such a notion was "inconsistent" with a union's right to evaluate relevant information, while deciding whether to pursue the grievance. The panel also observed that the union had the right to formulate its own theories to be advanced at arbitration and that a defending employer may not limit the theories a union wishes to pursue by denying it information. Further, it refused to place the Board in a position of having to speculate what defenses will be raised in an arbitration proceeding or having to police the proceeding to assure that certain defenses are not raised, directly or obliquely, as promised by the employer.

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[90] 263 NLRB 1293 (Chairman Van de Water and Members Jenkins and Hunter).

In *Columbus Products Co.,*[91] an administrative law judge determined that the employer did not violate section 8(a)(5) and (1) of the Act when, during the processing of a grievance based on the suspension of two union stewards who allegedly fomented insubordination by encouraging shift employees not to take an earlier lunch hour which the employer had requested following an assembly-line malfunction, it refused to provide the union with the names of shift employees who had volunteered information about the stewards' activities. He found that the union which had interviewed all employees on the shift (who denied any encouragement by the stewards) had access to all necessary and relevant information regarding the incident. In this respect, he determined that the employer had presented the union with the substance of the unnamed employees' comments and had informed the union that it had no plans to call any of the employees during the grievance-arbitration proceedings, but would rely solely on the the testimony of its supervisors.

The panel majority adopted the administrative law judge's findings, stating that, under the circumstances, all relevant and necessary information had been rendered and that requiring the employer to furnish the names of employees (all of whom had been interviewed by the union), would add nothing to the union's ability to represent the employees more effectively. In these circumstances, they agreed that the information requested was not of such significance as to warrant a finding of a violation.

Dissenting Member Jenkins disagreed and would find the requested information both necessary and relevant. He noted that in *Transport of N.J.,*[92] which involved a union's request for the names and addresses of passenger witnesses to a bus accident for which a driver was disciplined, the Board rejected an employer's contention that the names were irrelevant because the determination that the driver was at fault was based solely on the driver's testimony and physical circumstances; instead it held that the names were relevant to issues raised by the grievance concerning the fault determination and were necessary to enable the union to process the driver's grievance. Finding these considerations applicable herein, Member Jenkins argued that, although the union had interviewed all shift employees, knowledge of the names of employees who had volunteered information would enable the union, in this instance, to evaluate the strength of the employer's case and the merits of its own position and to verify the information provided the employer, particularly since employee responses to union inquiries were at odds with the employer's statements.

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[91] *Columbus Products Co., Div. of White Westinghouse Corp.,* 259 NLRB 220 (Members Fanning and Zimmerman; Member Jenkins dissenting).

[92] 233 NLRB 694 (1977).

The majority found Member Jenkins' reliance on *Transport of N.J., supra*, misplaced, stating that the names and addresses of passengers were relevant in that case as an aid to the union in evaluating the driver's testimony and physical evidence, and were necessary because the union had no other way of identifying who the passengers were and was unable to interview them without securing their names from the employer.

3. Other Issues

Following withdrawal of its enforcement petition in *GTE Automatic Electric*,[93] the Board panel reconsidered the issue of whether a wrap-up (or zipper) clause, by itself, constituted a waiver of a union's right to bargain during a contractual term on matters not specifically covered by the contract. In its initial decision, the panel concluded that the employer was required to bargain over the implementation during the contract of a savings and investment plan applicable to nonunion salaried employees so as to include union employees in the plan. It found that the employer was obligated to bargain about matters not specifically covered in the contract or unequivocally waived by the union and that the zipper clause contained in the parties' contract did not constitute a waiver because the benefit involved was neither in existence nor proposed at the time of negotiations. Accordingly, the panel found that the employer, by announcing and misrepresenting to employees that the plan was available only to nonunion salaried employees, and by refusing to bargain with the union concerning the plan, violated section 8(a)(5) and (1) of the Act.

Upon reconsideration of the issue in a supplemental decision,[94] the Board majority found that the employer might rely on the waiver contained in the parties' contractual zipper clause, as such clause "clearly and unequivocally" waived the union's right to bargain on the implementation of a new benefit plan. They noted, that, because the implementation of the plan benefiting nonunion employees did not constitute a unilateral change in existing working conditions and because the parties' bargaining history was silent on the matter, the majority stated that the employer lawfully could refuse to enter into midterm negotiations on the matter. The majority stated that, by permitting the employer to invoke the zipper clause to justify its refusal of the union's midterm demand for bargaining over a new benefit and by thus giving literal effect to the parties' waiver of their bargaining rights, industrial peace and collective-bargaining stability would be promoted. In so concluding, they emphasized that the employer sought only to maintain the *status quo* regarding terms and conditions of employment for unit employees, and had made no unilateral changes that directly and adversely affected unit employees or operated to undermine or derogate the union.[95]

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[93] 240 NLRB 297 (1972) (then Chairman Fanning and Members Jenkins and Penello).

[94] *GTE Automatic Electric*, 261 NLRB 1491 (Chairman Van de Water and Members Fanning, Zimmerman, and Hunter; Member Jenkins dissenting).

Dissenting Member Jenkins would reaffirm the Board's earlier conclusion that the zipper clause did not constitute a waiver. He pointed out that prior Board decisions have permitted withholding of benefits from union employees only in the context of good-faith bargaining and in the absence of unlawful motive. He argued that, in giving effect to the waiver at issue, the majority has sanctioned disparate treatment of represented and unrepresented employees and has allowed the employer to engage in discriminatory misconduct repugnant to the policies of the Act. Member Jenkins found no merit in the majority's finding that the zipper clause clearly and unequivocally waived the union's right to bargain on this matter since the plan in question was neither discussed nor even within the contemplation of the parties at the time of negotiations, and since the waiver did not take place in the requisite *context* of collective bargaining. He further characterized the majority's "conclusory assertion" that their position aids industrial peace as "sophistry," stating that collective-bargaining stability is not enhanced by refusals to bargain nor industrial peace achieved by permitting a discriminatory *status quo*.

In *Digmor Equipment & Engineering Co.*,[96] the administrative law judge had found that the employer did not violate section 8(a)(5) and (1) of the Act when it refused to abide by the arbitration provision of a recently expired collective-bargaining agreement and to process a grievance to arbitration because a question of representation existed at the time of the contract. In so doing, the administrative law judge found that the existence of a decertification petition supplied the employer with the objective considerations which prompted it to file a representation petition, rebutted the presumption of the incumbent union's majority status, and relieved the employer of an obligation to bargain or abide by the terms of the contract. He thus determined that, under the circumstances, it was inappropriate to assume that the arbitration provision survived the termination of the agreement.

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[95] Member Fanning noted that he would find that, absent the contractual zipper clause, the employer would have been obligated to bargain in good faith with the union regarding the plan conferred on nonunit employees.

[96] 261 NLRB 1175 (Members Fanning, Kenkins, and Zimmerman; Chairman Van de Water concurring).

The Board majority found, contrary to the administrative law judge, that the employer violated section 8(a)(5) and (1) of the Act when it refused to abide by the arbitration procedures of the recently expired contract and refused the incumbent union's request to arbitrate a change. In so doing, they relied on *American Sink* [97] which the administrative law judge considered to be inapplicable and in which the Board, following the Supreme Court's decision in *Nolde Bros.,*[98] found that, where parties to a contract have agreed to subject certain matters to grievance and arbitration, their duty to arbitrate survived the termination of the contract when the dispute was over an obligation arguably created by the expired agreement.

In applying *American Sink,* the majority pointed out that (1) the basis for the grievance arguably was created by the contract since the conduct which occasioned the discharge and thus gave rise to the grievance occurred, at least in part, prior to the contract's expiration, (2) the employer had cited a contractual provision as justification for the discharge, and (3) it initially had processed the grievance pursuant to the contractual grievance procedure. For these reasons noted above, they disagreed with the administrative law judge that the circumstances of the case indicated that the parties did not intend the arbitration provision to survive the contract's expiration date and that the employer had entertained a good-faith doubt, based on objective circumstances, as to the incumbent majority's status because the union's majority had been reaffirmed in the Board election held pursuant to the employer's petition. In this respect, the majority observed that the employer had asserted the expiration of the contract in defense of its refusal to process further the grievance, after the election in which employees had overwhelmingly reaffirmed the union's majority status. They further added that, in the circumstances, they were not convinced that even the existence of the employer's reasonable doubt would warrant the inference that the parties did not intend the arbitration provision to survive the expiration of the contract.

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[97] *American Sink Top & Cabinet Co.,* 242 NLRB 408 (1979).

[98] *Nolde Bros.* v. *Loc. 358, Bakery & Confectionery Wkrs. Union, AFL-CIO,* 430 U.S. 243 (1977).

In a concurring opinion, Chairman Van de Water observed that the employer's termination report revealed that the discharge which gave rise to the grievance and subsequent arbitration was based on conduct that began prior to the contract's expiration. He also stated that the employer's action was warranted pursuant to a contractual provision permitting discharge for "just cause." Thus, relying on the Supreme Court's holding in *Nolde*, the Chairman found that the employer was required to arbitrate this matter. Nevertheless, he stated further that he would not find to be arbitrable those discharges based on conduct occurring after the expiration of the contract, noting that he did not approve or accept the decision in *American Sink* to the extent that it may be construed as reaching a contrary result.

In *Bob's Big Boy*,[99] the employer, a food commissary engaged in the business of preparing and distributing food products, refused to bargain with the incumbent union about its decision to contract out and discontinue its shrimp processing operation which resulted in the termination of 12 employees. In finding that the employer had not violated section 8(a)(5) and (1) of the Act, the administrative law judge determined that the employer's action represented a "major shift in the direction of the company" and, in support of his determination, pointed to the dismantling of its entire shrimp processing operation, and to the restructuring of its capital in the sale, or return to lessors, of much of the machinery used in the operation.

Although they disagreed with his finding, the Board majority agreed with the administrative law judge that, in analyzing whether the employer had a statutory duty to bargain with the union over its decision to modify its operation, he correctly identified a legal distinction between classic subcontracting and partial closing They noted that the Board and the courts have held generally that an employer's decision to subcontract unit work is within the scope of an employer's mandatory bargaining obligation;[100] while, conversely, when an employer closes down part of its plant or business, the Board has held that such a decision may not be encompassed in the scope of the employer's mandatory bargaining obligation.[101] The Majority pointed out that the Supreme Court in *First Natl. Maintenance Corp.* v. *N.L.R.B.*,[102] held that an employer's *decision* to close down part of its business was not part of section 8(d)'s "terms and conditions" which require mandatory bargaining.[103] However, they also noted that the distinction between subcontracting and partial closing is not always readily apparent and that a determination as to whether an employer's decision will fall within the scope of its mandatory bargaining obligation requires a case-by-case analysis of such factors as the nature of the employer's business before and after the action taken, the extent of capital expenditures, the bases for the action, and, in general, the ability of the union to engage in meaningful bargaining in view of the employer's situation and objectives.

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[99] *Bob's Big Boy Family Restaurants, Div. of Marriott Corp.*, 264 NLRB 1369 (Member Fanning, Jenkins, and Zimmerman; Chairman Van de Water and Member Hunter concurrin in part and dissenting in part).

[100] *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964); *Intl. Harvester Co.*, 2 NLRB 712 (1978); *Mobil Oil Corp.*, 219 NLRB 511 (1965); *Town & Country Mfg. Co.*, 136 NLR 1022 (1962), enfd. 316 F.2d 846 (5th Cir. 1963).

In the instant case, the majority concluded that the administrative law judge, in determining that the employer's action represented a "major shift in the direction of the company," engaged in a rather "simple analysis."

In their view, a proper analysis began with an accurate characterization of the employer's business. While the employer literally was in the shrimp processing business, a more accurate description would be that the employer was in the business of providing prepared foodstuffs to individual restaurants and shrimp preparation which existed as a component part of that business. With this more accurate definition of the employer's business in mind, the majority concluded that the employer engaged in a subcontracting of the work of shrimp processing, rather than in a partial closing of its food preparation business.[104] They first noted that the employer did not engage in a major shift in direction of the company because, before and after the subcontracting, it provided prepared foodstuffs as well as processed shrimp to its various stores. While acknowledging that the capital transactions were not *de minimis*, the majority also found that the employer was not required to engage in any substantial capital restructuring or investment as a result of the changes, or after the changes became operative, noting that, while the employer sold some of its processing machines to the subcontractor, it simply returned others to the lessor.

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[101] *Kingwood Mining Co.*, 210 NLRB 844 (1974) (Member Jenkins dissented and placed no reliance on that decision); *Summit Tooling Co.*, 195 NLRB 479 (1972); *General Motors Corp., GMC Truck & Coach Div.*, 191 NLRB 951 (1971).

[102] 452 U.S. 666 (1981).

[103] In its decision, the Court distinguished between a partial closing and a decision to subcontract unit work. The Court expressed no view on the mandatory bargaining nature of subcontracting, stating that each case must be considered on its particular facts.

[104] Contrary to their dissenting colleagues who, like the administrative law judge, ignored the fundamental purpose of the employer's operation to provide food to retail restaurants, the majority distinguished the instant case from *First Natl. Maintenance*, where the employer totally ceased servicing its clients, because here the employer not only continued to service its restaurants, but also continued to supply them with prepared shrimp.

In any event, the employer retained possession of the plant facility and other equipment, including freezers and a hydraulic system. Finally, they found that the employer's primary concerns in subcontracting its shrimp processing, to wit, escalating production costs (which affected wages and other employment costs) and quality control (which could benefit by input from the union), were particularly suited for resolution through the collective-bargaining process. Accordingly, the majority found that the employer violated Section 8(a)(5) and (1) by refusing to bargain over its decision to subcontract the unit work of shrimp processing.

Dissenting Chairman Van de Water and Member Hunter agreed with the administrative law judge that the employer's decision to close down its shrimp processing operation was outside the scope of mandatory collective bargaining and disagreed with the majority's improper characterization of the nature of the employer's business and their overly restrictive reading of *First Natl. Maintenance, supra.* The dissenters argued that the majority's test of a substantial change in business direction was based upon an overly broad definition of "business," and would dictate contrary results in cases where the Board has found partial closings and no duty to bargain, as in *General Motors Corp.,*[105] where the employer sold a particular truck center, but continued to produce and to sell trucks. Further, they contended that the Supreme Court, in determining that a partial closing had occurred, implicitly rejected the analysis now advanced by the majority, since in the instant case, as well as in *First Natl.,* the employer still remained in business. They also contended that there were factors, other than costs, over which the union could exercise little, if any, influence or control in the context of bargaining, such as quality and portion control of the employer's product.

In *Chevron Chemical Co.,*[106] the administrative law judge found that the employer violated section 8(a)(5) by bargaining in bad faith or indulging in "surface bargaining" and that the ensuing strike was caused or prolonged by such unfair labor practice. In so finding, he concluded that the employer's proposal of a broad management-rights clause and a no-strike clause, in conjunction with a limited arbitration proposal, was "predictably unacceptable" to the union and that its wage offer was far below what a "self-respecting" union could take back to the employees.

In considering the administrative law judge's findings, the Board set forth its approach in determining whether parties' have complied with the duty to bargain in good faith in the context of a

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[105] *General Motors Corp., GMC Coach & Truck Div.,* 191 NLRB 951 (1971).

[106] 261 NLRB 44 (Chairman Van de Water and Members Fanning, Zimmerman, and Hunter).

"surface bargaining" allegation. The Board explained that it looks to whether the parties' conduct evidences a real desire to reach an agreement, a determination that is made on the record as a whole, including the course of negotiations as well as contract proposals. Analyzing the administrative law judge's findings in the light of this approach, the Board found, contrary to the administrative law judge, that the employer did not engage in surface or bad-faith bargaining prior to the strike, noting that section 8(d) does not "compel either party to agree to a proposal or require the making of a concession." In so doing, it observed that the language contained in certain of the employer's proposals, including the strong management-rights and no-strike clauses and limited arbitration, was, at least in part, based on existing contracts with the union for other units at other locations. The Board noted that, in an attempt to obtain improvements it had not been able to secure for its other units, the union itself had used existing contracts and language therein as bases to propose a weaker management-rights clause and a broader arbitration provision. It also pointed out that the parties had reached agreement in other areas at the time of the strike. Thus, the Board determined that both parties had engaged in hard bargaining in an effort to strengthen their respective positions and that the employer's proposals did not warrant a finding of bad faith since they could not fairly be characterized as harsh, vindictive, or otherwise unreasonable. It further concluded that the totality of the circumstances supported a conclusion that the employer had bargained in good faith, noting that the parties had for several years maintained a collective-bargaining relationship in other units and that the record reflected no employer refusal to meet and confer or provide information, no adamant refusal to make concessions, and no failure to provide justification of its bargaining position. Finally, the Board observed that no other unfair labor practices were involved and that the record did not suggest that the parties were at an impasse when the strike was called nor did it reflect any conduct of the employer away from the bargaining table which would suggest that its bargaining positions were taken in bad faith.

D. Union Interference With Employee Rights

Even as section 8(a) of the Act imposes certain restrictions on employers, section 8(b) limits the activities of labor organizations and their agents. Section 8(b)(1)(A), which is generally analogous to section 8(a)(1), makes it an unfair labor practice for a union or its agents to restrain or coerce employees in the exercise of their section 7 rights, which generally guarantee them freedom of choice with respect to collective activities. However, an important proviso to section 8(b)(1)(A) recognizes the basic right of a labor organization to prescribe its own rules for acquisition and retention of membership.

1. Union Rules on Resignation During a Strike

In *Dalmo Victor* [107] the Board accepted the remand of its earlier decision [108] from the Ninth Circuit [109] and considered the validity of a union's constitutional provision restricting a members' right to resign from the union during a strike or within 14 days preceding its commencement. Unlike the earlier decision, the Board majority found that this restriction unreasonably interfered with employees' section 7 rights and that attempts to impose and collect fines under such a provision against members who tendered their resignations and returned to work during the course of a strike violated section 8(b)(1)(A) of the Act. In reaching this conclusion, the Board found it necessary to balance two fundamental principles which inherently conflict. The first principle is the codified section 7 right of an employee to refrain from collective activity, and the second is the legitimate interest of a certified employee representative in protecting employees joined in collective economic activity—an interest which reasonable rules governing the acquisition or retention of membership or resignation are necessary to protect.[110] Neither principle is absolute and the employee representative may impose only certain limited restrictions on a member's right to resign, including reasonable time restrictions when a strike may be imminent or is underway. Accordingly, the Board majority, balancing these conflicting interests, held that a union rule which limits the right of a member to resign only to nonstrike periods constitutes an unreasonable restriction on a member's section 7 right to resign since it failed to protect the interest of individual members.[111] They also found that, in order to vindicate the vital interest of the union and its striking members, a union is entitled only to reasonable notice of the effective date of resignations which occur immediately before or during a strike, Accordingly, the majority provided that, as a general rule, a reasonable accommodation between the conflicting interests and rights would be achieved by restricting a union member's right to resign for a period not to exceed 30 days after the tender of the resignation.[112] Because the union's constitutional provision permitted resignations only if they were submitted no later than 14 days before the strike, the majority found that the union violated section 8(b)(1)(A) by attempting to impose and enforce fines for violation of the constitutional provision.

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[107] *Machinists Loc. 1327, IAM Dist. 115 (Dalmo Victor)*, 263 NLRB 984 (Members Fanning and Zimmerman; Chairman Van de Water and Member Hunter concurring; Member Jenkins dissenting).

[108] 231 NLRB 719 (1977).

[109] 608 F. 2d 1219 (1979). In accepting the court of appeals remand as the law of the case, the Board majority noted that it otherwise adhered to its earlier determination that the provision in issue constituted an unlawful attempt to restrict postresignation conduct of former members.

[110] Such rules are recognized in the proviso to sec. 8(b)(1)(A), which reads as follows:

> Provided, *That* this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein

[111] Member Fanning noted, in his separate view, that the question is not the legality of restrictions on resignation, but whether the restrictions are effective and that the employee right involved was the sec. 7 right to refrain from collective activity, not the right to resign from membership.

In their concurring opinion, Chairman Van de Water and Member Hunter agreed that the constitutional restriction in question violated section 8(b)(1)(A) of the Act, but they did so on the basis of a separate rationale to the effect that any restriction upon a union member's right to resign would be unreasonable. They were of the opinion that a union's legitimate interest in maintaining strike solidarity was but a threshold issue in determining the lawfulness of a union rule, and, under their analysis, any restriction on resignation, including a 30-day notice provision, runs directly afoul of three labor law policies established by Congress, to wit the right of employees to refrain from concerted activities, the distinction set forth in section 8(b)(1)(A) between internal and external union actions, and the limitation embodied in section 8(b)(2) and in the proviso to section 8(a)(3) which together allow a union to compel core membership, but prohibit it from compelling full membership. In their view, since a union's constitutional interest in solidarity was not of relatively equal import and legal significance with express statutory rights, the Board's 30-day rule was little more than a striking of a compromise best left for the legislature. Accordingly, they would find any restriction on resignation unlawful.

Member Jenkins, dissenting, reaffirmed his position set forth in his previous dissent in this proceeding that the instant restriction on resignation during a strike or within 14 days of its commencement was reasonable and valid. He noted that the union specifically had informed employees, including the individual charging parties, of the relevant constitutional provisions prior to the vote authorizing the strike and warned them that anyone crossing the picket line could be fined. Accordingly, Member Jenkins concluded that the union was entitled to levy fines against the charging parties as a means of enforcing a constitutional provision governing the retention of union membership.

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[112] The Board noted that, under extraordinary circumstances, more than 30 days may be needed by a union.

2. Duty of Fair Representation

During the past fiscal year, the Board considered cases involving the principle that a labor organization has a duty to represent fairly all employees in a bargaining unit for which it is statutory representative.

In *Browning-Ferris Industries,*[113] the full Board adopted an administrative law judge's finding that a union which has a constitutional provision that resignations of members become effective 30 days after receipt of a letter of resignation must give effect to resignation letters which do not meet these constitutional restrictions, unless the union takes reasonably prompt steps to tell the employees about these restrictions. This requirement, applicable to restrictions on resignation which otherwise may be valid, is based on precedent setting forth the established standard that the union has the burden to establish that members knew or consented to the union's constitutional restrictions on their resignation right especially where a union had attempted to impose sanctions on members for conduct subsequent to their nonconforming resignations.[114] While the union's duty to explain is ordinarily limited to situations where the members specifically ask for an explanation or where the union has reason to suspect the development of actual problems involving the interpretation of union rules, the administrative law judge found, and the Board agreed, that in this case the nonconforming resignation letters showed the members were unaware of the governing restrictions in the constitution and therefore the union had a duty to explain the applicable restrictions. Since the union failed to meet such notice standards, it was found to have violated section 8(b)(1)(A) by fining members for working behind picket lines after their attempted resignations.

In *Houston Light & Power Co.,*[115] the Board panel considered whether a union could lawfully refuse to recognize a member's attempted resignation from the union and timely withdrawal of a dues-checkoff authorization on the basis of restrictions not contained in the union's constitution and bylaws or printed on the dues-checkoff authorization card. The checkoff card signed by the member specified that the authorization could be revoked during a 2-week period prior to the next anniversary date of the card's execution. During such a period, the employee communicated to the union, both in writing and orally, his desire to discontinue his membership. In response, the union insisted that the member sign a preprinted dues-checkoff revocation form before he would be allowed to resign. The member sought to sign such a form, but was unsuccessful in part due to the union's conduct. The Board panel found that the written and verbal exchanges between the member and the union showed that they used the terms resignation and revocation of dues interchangeably and that they equated the terms as being synonymous. Thus, the panel concluded that the member clearly communicated his intention to resign and that there were no impediments to such resignation. It also found that the member effectively revoked his outstanding checkoff authorization because the only reference to revocation on the authorization card was with respect to the 2-week period for resignation, with which the member had complied.[116] Further, the panel found that, even if the execution of a dues cancellation form had been a precondition to effective revocation of the checkoff authorization, the union had frustrated the member's attempts to comply with such precondition. Accordingly, the Board panel found that the union violated section 8(b)(1)(A) and (2) of the Act by refusing to give effect to the member's valid resignation and by thereafter continuing to accept dues deductions from the member's wages.

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[113] *Miscellaneous Drivers & Hlprs., Loc. 610, a/w IBT (Browning-Ferris Industries),* 264 NLRB 886.

[114] *Loc. 1384, Automobile Wkrs. (Ex-Cell-O Corp.),* 227 NLRB 1045 (1977), *Oil, Chemical & Atomic Wkrs. Intl. Union, Loc. 6-578 (Gordy's),* 238 NLRB 1227 (1978).

[115] *IBEW, Loc. 66, AFL-CIO (Houston Lighting & Power Co.),* 262 NLRB 483 (Chairman Van de Water and Members Jenkins and Zimmerman).

In another case, *East Tex. Motor Freight,*[117] a Board panel found that the duty of fair representation does not place an absolute obligation on a union to take affirmative actions to further the policy of the labor laws. In this case, union members on their way to attend union meetings were physically assaulted on two occasions outside a union meeting hall. In the first incident, the assault was of brief duration and was committed by unidentified individuals. Contrary to the administrative law judge, the Board panel found the union's duty of fair representation does not impose a duty to insure the individual safety of its members and the security of the union meeting hall and the immediate area. Relying on the absence of evidence that the union had any part in the assault, that its agents knew who was committing the assault or who was being assaulted, or that it was at fault for not interceding during the brief altercation, the panel concluded the union's inaction was not proscribed by section 8(b)(1)(A). In the second incident, however, the union was found to have violated section 8(b)(1)(A) of the Act by its failure to take any actions after another member was assaulted, while attempting to attend a union meeting. In that incident, a union steward told the member he was not going to attend the meeting and thereafter, as the member attempted to enter a police car, twice pushed the car door against his leg. Although the steward was not acting as an agent of the union at the time, the panel found that the union's subsequent failure to reprimand the steward or to make any effort to prevent him from engaging in such conduct constituted a condonation of the steward's actions against the member. Concluding that the union member was restrained and coerced in the exercise of his protected rights, the panel found the union's failure to act in connection with the second incident violated section 8(b)(1)(A).

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[116] Chairman Van de Water separately stated that, absent a contract provision or any union restriction in its constitution or bylaws restrictive of resignation, an effective membership resignation automatically cancels a dues-checkoff provision.

[117] 262 NLRB 868 (Members Fanning, Jenkins, and Zimmerman).

In *New England Power Service Co.,*[118] a Board panel considered whether union assistance to striking members was violative of section 8(b)(1)(A) or was protected by the proviso of section 8(b)(1)(A) which permits unions to prescribe rules with respect to the acquisition or retention of membership. In this case, the union decided to honor the picket line of another union and later to commence its own strike against the employer, in breach of a no-strike clause. The union forgave the dues and paid the health benefit premiums of its striking members who could not afford to pay the premiums on their own. In order to meet its increased financial obligations arising from the strike, the membership voted to increase the dues on members who continued working. The panel noted that, pursuant to the provision of section 8(b)(1)(A), the Board and courts distinguished between internal and external enforcement of internal union rules which have a legitimate union interest, impair no labor law policy, and are reasonably enforced against members who can resign to escape the effect of the rules. With these principles in mind, the panel concluded that the minimal action herein did not restrain and coerce employees in the exercise of section 7 rights within the meaning of section 8(b)(1)(A). It noted that no direct action, such as a fine, was being taken against members who chose not to honor the picket line, and that the employment status of the nonstriking members was not affected since they were in the same position as if there had been no strike. Although the cost of assistance provided to the striking members would ultimately be borne by the general membership by special assessment or by the raised dues, the panel found that it was not shown that such "remote and exiguous impact" was a sufficient predicate for Board instrusion into internal union affairs and for an 8(b)(1)(A) violation. Accordingly, the panel dimissed this allegation.

During the past fiscal year, the Board also considered whether a union could require the deposit of a cash bond as a precondition for the filing and consideration of a grievance. In *Combustion Engineering,*[119] a panel majority held that a union's failure and refusal to discuss or to assess informally the merits of a unit employee's grievance prior to the receipt of the cash dispute bond violated its duty of fair representation under section 8(b)(1)(A).[120] Under negotiated procedures for hiring hall referrals, the provision for the resolution of related disputes included a requirement that grievants deposit a $50 cash dispute bond which would be returned only if the grievance is resolved in his favor. Absent such favorable ruling, the money would be used to defray the expenses incurred in processing the grievance. In finding the 8(b)(1)(A) violation, the panel majority relied on the union's obligation under *Vaca* v. *Sipes,* 386 U.S. 171 (1967), to make decisions as to the merits of grievances in good faith and in a nonarbitrary manner. They found that the union processed the employee's grievance in an arbitrary and perfunctory manner by refusing to discuss the grievance preliminarily before demanding a fee. Accordingly, they found that the union deprived the unit employee of his right to grievance representation in violation of section 8(b)(1)(A).

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[118] *Loc. 345, Brothd. of Utility Wkrs. of New England (New England Power Service Co.),* 261 NLRB 512 (Members Fanning, Jenkins, and Zimmerman).

Member Jenkins, dissenting, disagreed that the cash bond requirement for grievances under the referral rules was unlawful. He pointed out that the employers signatory to the applicable bargaining agreement had negotiated the referral rules as a *quid pro quo* for permitting the union to operate an exclusive hiring hall, and that the related grievance procedure with a cash bond requirement had been in existence for over 20 years. He further noted that the bargaining agreement contained a separate general grievance provision for which there was no cash bond requirement. On the facts, Member Jenkins concluded that the Board's decision interferes with the parties' well-established and stable bargaining relationship, and undermines the negotiated *quid pro quo* arrangement for the hiring hall. Further, he was of the opinion that the filing fee was not in any sense arbitrary, but was related to the orderly management of the hiring hall and was a legitimate device to screen out frivolous grievances arising only out of the referral rules. Accordingly, Member Jenkins concluded that a violation of section 8(b)(1)(A) had not been established.

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[119] *Intl. Brothd. of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, Loc. 72, AFL-CIO (Combustion Engineering),* 260 NLRB 232 (Members Fanning and Zimmerman; Member Jenkins dissenting).

[120] The panel majority did not pass on the broader issue of whether such a dispute bond would, under any circumstance, be a *per se* violation of sec. 8(b)(1)(A).

E. Union Coercion of Employer in Selection of Representative

Section 8(b)(1)(B) of the Act makes it an unfair labor practice f a union to coerce or restrain an employer in the selection of i representative for the purposes of collective bargaining or the a justment of grievances.

During this report year, the Board considered whether union d cipline of members for disruptive conduct at a union meeting la fully could include barring them from serving as an employer re resentative within the meaning of section 8(b)(1)(B). In *Ceme League*[121] a Board panel found that the imposition of such dis pline, barring members from serving as foremen, and performi representative functions for their employers, although based on legitimate union interest, adversely affected the actual or potenti employers and dictated to them who their representatives cou not be. In so ruling, the Board found that union discipline whi was neither directed at, nor related to, members' conduct as fo men restrains and coerces under section 8(b)(1)(B), if it reasonab tends to deprive an employer of the right to select its represent tive. Accordingly, an 8(b)(1)(B) violation was found.

F. Union Bargaining Obligation

A labor organization, as exclusive bargaining representative the employees in an appropriate unit, no less than an employ has a duty imposed by the Act to bargain in good faith abo wages, hours, and other terms and conditions of employment. labor organization or an employer respectively violates secti 8(b)(3) or 8(a)(5) if it does not fulfill its bargaining obligation.

In two cases decided during the past fiscal year, the Board co sidered whether, in the circumstances of those cases, a union cou insist that an employer agree to the terms of an area agreeme reached with other employers.

In the first case, *Food City West,*[122] a Board panel adopted administrative law judge's conclusion that the union therein viol ed section 8(b)(3) of the Act by seeking to impose on an employ an area agreement negotiated by a multiemployer association which the employer was not a member and striking in support these efforts. The employer earlier had signed an agreement wi terms identical to those in the union's area agreement. Prior to t expiration of this agreement, the employer notified the union that it wished to open the agreement to change its terms. However, the union held no negotiations with the employer while it was negotiating a new area agreement with the multiemployer association. After those negotiations had concluded, and the new area agreement was ratified, the union requested that the employer sign copies of that area agreement. The employer demurred and gave the union a list of proposals and changes it wanted in the contract. The union informed the employer that it would not deviate from the area agreement and that the employees would strike if the employer stood firm in its refusal to sign the area agreement, pointing out that "everybody had always just signed whatever the area agreement was" and that, if it were to make an exception for the employer, there would be "200 little agreements" within a year. The employer then met with a union spokesperson, who was unaware that he had authority to negotiate, but who also stated that the union would not deviate from the areawide contract and that it intended to institute "economic action," if the employer did not change its position. Thereafter, the union called the employees out on strike and during later negotiations continued to be unyielding in its insistence that the employer sign the area agreement. Noting that it was settled that while a union may adopt a uniform wage policy and seek to implement it vigorously, it was not exempted from the obligation to bargain in good faith, the administrative law judge concluded that the union's multifaceted efforts to impose the area contract on the employer constituted conduct which did not comport with good-faith bargaining and which was violative of section 8(b)(3) of the Act.

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[121] *Loc. 46 Metallic Lathers & Reinforcing Iron Workers (Cement League)*, 259 NLRB 70 (M bers Fanning, Jenkins, and Zimmerman).

[122] *United Food & Commercial Wkrs. Union Loc. 1439, chartered by United Food & Com cial Wkrs. Intl. Union, AFL-CIO-CLC (Food City West)*, 262 NLRB 309 (Chairman Van de W and Members Jenkins and Hunter).

In the second case, *R. A. Hatch Co.*,[123] a Board panel examined this question in the context of an employer's claim that such union insistence that it sign an area agreement had caused a bargaining impasse which privileged the implementation of the employer's contract proposals.

The majority concluded that, after it timely withdrew from multiemployer bargaining, the employer's efforts at bargaining with the unions gave the employer every reason to believe that it was at loggerheads with the unions involved over the area agreement issue and that no agreement could be reached in the foreseeable future. Thus, they found that these efforts, during an almost 4-month period, resulted in one union first requesting the execution of a short-form agreement, then having its negotiator state he did not believe his union would be willing to enter into negotiations with a separate employer, and finally making a request that nego-

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[123] 263 NLRB 1221 (Members Fanning and Zimmerman; Member Jenkins dissenting).

tiations be postponed pending the outcome of concurrent multier
ployer bargaining. They also found that the employer's efforts wi
a second union initially resulted in some indications of separa
bargaining, but that, after a single meeting, the union's negotiat
was replaced and the employer was thereafter informed that
would be the "short form or nothing." Accordingly, the majori
agreed with the administrative law judge that an impasse w
reached between the employer and the unions over the signing of
short-form memorandum of agreement and that its unilateral i
plementation of its contract proposals did not violate section 8(a)(
and (1) of the Act.

Member Jenkins, dissenting, stated that a review of the reco
revealed that the impediments to collective bargaining were larg
ly the employer's creation and he noted that the employer had n
engaged in exhaustive negotiations, but had lost patience with i
bargaining obligations. Thus, he noted that the employer delay
negotiations by filing representation election petitions and also b
not submitting its proposals until 2½ months after its initial r
quest for separate bargaining. With respect to the first unio
Member Jenkins found that the union negotiator's statement th
he did not know if his union would be willing to enter into separa
negotiations was ambiguous, since it was not unlawful for a unio
to seek uniform terms for employees in different bargaining unit
and that the employer's negotiator drew an unwarranted assum
tion, after only 10 minutes of bargaining, that the union's negoti
tor had no bargaining authority. He also relied on the employer n
gotiator's admission that, at the second and last meeting with th
first union, no ultimatum was presented regarding the area agre
ment, and that the employer negotiator had agreed to confer wit
his client on the request for delay. Member Jenkins concluded th
no impasse resulted and that the two brief meetings served only
define the parties' initial positions, a starting point from which n
gotiations should have continued. Regarding the second union, h
found that the only distinguishing feature was a single statemen
from the union that "it was the short form or nothing," but th
such a statement was only an opening gambit or a prelimina
sparring match, which was insufficient to show the exhaustion
negotiations. Accordingly, he concluded that the employer's asse
tion of impasse was unfounded and that it was not privileged
make unilateral changes.

In response to Member Jenkins' dissent, the majority pointed o
that (1) the issue that led to the impasse was not specific bargai
ing proposals, *per se,* but whether or not the unions would be wil
ing to sign individual contracts, rather than simply short-form

binding the employer to the master labor agreement; (2) the short-form issue was brought early to the unions' attention; (3) the employer attempted to resolve the short-form issue, even during the pendency of its election petitions, and (4) although the parties had exchanged numerous oral and written communications and had held meetings, there was no sign that the unions were ready to alter their position on the short-form issue.

In *Master Insulators Assn.*,[124] a Board panel had to determine whether a union violated section 8(b)(3) when its representatives on a joint apprenticeship committee (JAC), established under its contract with the employer, refused to meet with employer representatives on this committee. Historically, JAC representatives also served as trustees for a trust fund, authorized by section 302(c)(5) of the Act, which financed the apprenticeship program. Because the trust fund was operating without a written trust agreement, in violation of section 302(c)(5), the employer directed its representatives to resign their trustee positions, while expressly retaining their status as employer representative on the JAC. Thereafter, the union refused to convene a meeting of the JAC so long as one of the employer's resigned trustees was present. As a result, the apprenticeship program was crippled. The union contended that the employer members of JAC were not section 8(b)(1)(B) bargaining representatives with whom it had to bargain.

The Board panel agreed with the administrative law judge's conclusion that the union thereby violated section 8(b)(3) of the Act. While also agreeing with the union that, under *Amax*,[125] one who serves as a trustee of a 302(a)(5) fund is not, in that capacity, acting as an 8(b)(1)(B) representative, the panel stated that, once the employer's representatives resigned as trustees, the inquiry must proceed to the nature of their function as JAC representatives. Referring to the provisions of the collective-bargaining agreement, the panel found that the JAC had "responsibility for fleshing out the collective-bargaining agreement by formulating, adopting, and administering an apprenticeship program." Therefore, it concluded that the role of the JAC was distinguishable from the training committee in *Amax*, the function of which was merely to advise various companies in the multiemployer association about employee training programs. Each of the employers in *Amax* was free to disregard the committee's advice and to develop its own program. In these circumstances, the Board, contrary to the union's contention, concluded that, in the process of reaching agreement in the specif cation and operation of the program which they were bound to fo mulate and implement, the JAC members necessarily acted as co lective-bargaining representatives within the meaning of sectio 8(b)(1)(B). Accordingly, the panel found that the union violated se tion 8(b)(3) of the Act by refusing to meet and bargain collectivel with the employer's lawful bargaining representatives.

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[124] *Intl. Assn. of Heat & Frost Insulators & Asbestos Wkrs. Loc. 27, AFL-CIO (Master Insulators Assn.)*, 263 NLRB 922 (Chairman Van de Water and Members Fanning and Hunter).

[125] *United Mine Workers of America, Loc. 1854 (Amax Coal Co., Div. of Amax)*, 238 NLRB 1583 (1978), enfd. as modified 614 F.2d 872 (3d Cir. 1980), modification reversed 453 U.S. 322 (1981).

In another case decided this report year, *General Contracto Assn. of N.Y.,*[126] a Board panel found that a union which repr sented truckdrivers on a multiemployer basis violated sectio 8(b)(3) of the Act when it made a demand during the term of a existing bargaining agreement that the multiemployer associatio hire at its various construction sites armed guards represented b the union to protect union members from harassment by differe minority groups seeking employment. The union threatened strike the next morning those employers who refused to meet the demands, which the union stated were "nonnegotiable." Therea ter, union members employed by various association employers the various construction sites struck, ceased to work for 3 days, a stationed themselves at the entrances to the construction sites order to tell drivers seeking entrance the nature of the disput The Board panel found that the newly sought employees we guards within the meaning of the Act; the union was ineligible be certified as the collective-bargaining representative of such e ployees because it would be admitting both guards and nonguar to membership; and by seeking to bargain with the employers r garding a classification of employees—guards—who were not in th unit, the union violated section 8(b)(3) of the Act.

G. Prohibited Strikes and Boycotts

The statutory prohibitions against certain types of strikes a boycotts are contained in section 8(b)(4) of the Act. Clause (i) of th section forbids unions to strike, or to induce or encourage strikes work stoppages by any individual employed by any person engag in commerce, or in any industry affecting commerce; and clause (makes it unlawful for a union to threaten, coerce, or restrain a such person, where the actions in clause (i) or (ii) are for any of t objects proscribed by subparagraphs (A), (B), (C), or (D). Provisos the section exempt from its prohibitions "publicity, other th picketing," and "any primary strike or primary picketing."

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[126] *Loc. 282, IBT (General Contractors Assn. of N.Y.),* 262 NLRB 528 (Members Fanning, J kins, and Zimmerman).

In *Riverway Co.,*[127] the Board was presented with the issue whether, in a secondary boycott strike situation, a union's primary work-preservation objective may be lost for failure to dispute with the employer the loss of unit work within a reasonable amount of time. The employer, a barge transportation company, owned and operated towboats using crews of employees represented by the union. In mid-1977, as a result of its refusal to meet the demands of the union for changes in the collective-bargaining agreement, the employer stated its intent to look into other means to perform the work. It subsequently chartered out its boats without crews, and then was able to recharter them with crews employed by another employer and unrepresented by any labor organization. At the time, the union engaged in a limited form of protest. Shortly thereafter, the collective-bargaining agreement expired. The union took no other action until November 1979, when it expressed its desire to represent the employer's pilothouse personnel. Thereafter, in April 1980, the union twice picketed, allegedly with a work-preservation object, one of the towboats which were pulling lines of the employer's barges. Finding that the union had full knowledge of the employer's change in operations in 1977, but had failed to assert its rights for almost 3 years after the complained-of conduct, the panel majority concluded that the union had acquiesced in the employer's change in operations, that a labor dispute with the employer no longer existed, and that the union's dispute, if any, lay with the employers who controlled the nonunion personnel, on the employer's towboats. Accordingly, the majority found that the picketing of the employer in 1980 violated section 8(b)(4)(ii)(B) since its object was to force or require the employer to cease doing business with the employers who controlled the personnel on the towboats.

Member Fanning, dissenting, agreed with the underlying decision of the administrative law judge who found that there was no supportable basis for a violation because the 1977 labor dispute continued to exist when the union picketed and the union had not, at any time, acquiesced in the employer's change in operations. Accordingly, he would have dismissed the complaint.

In *Alaska Timber Corp.,*[128] the Board again was faced with a union's claim, in a jurisdictional dispute context, that picketing of an employer to assign work to employees it represented was in support of a valid work-preservation objective. The employer which initially had sold lumber on an FAS (free alongside) basis so that it completed its responsibility by placing the lumber alongside ships

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[127] *Marine Officers Assn., Teamsters Union Loc. 54 (Riverway Co.),* 260 NLRB 1360 (Chairman Van de Water and Member Zimmerman; Member Fanning dissenting).

[128] *Intl. Longshore Wkrs. Union, Loc. 62-B (Alaska Timber Corp.),* 261 NLRB 1076 (Members Jenkins and Zimmerman; Member Fanningk dissenting).

at a docking facility and the customer was responsible for loa
the lumber onto the ships. Most of this loading work for the
ployer's customers was performed by SES, a stevedoring comp
which had a contract with the union. The employer had no cont
tual relationship, at any relevant time herein, with either SE
the union. The employer thereafter decided to alter its operati
to sell lumber on an FOB (free on board) basis so that it w
retain responsibility for the lumber until it was loaded onto
ship, and began to use its own unrepresented employees to load
lumber. About a year before it implemented its decision, the
ployer notified SES that it planned to use its own unrepresen
employees to load the lumber onto the ships. In response, the u
attempted, unsuccessfully, to persuade the employer to assign
work to its members, stating that the employer did not have to
the stevedoring company used by its customers, and offerin
bring stevedoring crews in from other cities so that the work
be done "without local people." When the employer refused
swayed from its decision, the union picketed the loading of a
by the employer's unrepresented employees.

The panel majority rejected the union's claim that the obje
of its picketing was limited solely to the preservation of the dis
ed loading work which the employees it represented had
formed. Based on the statements made to the employer, the m
ity found that the union's object was to compel the employe
hire union members, that the union was not merely attemptin
persuade the employer to return to its previous mode of opera
and that its picketing was not conducted pursuant to a valid w
preservation objective. Rather, they found that there was rea
able cause to believe that section 8(b)(4)(D) of the Act had been
lated because the union sought to compel the employer to as
the disputed work from its unrepresented employees to ano
group of employees the union represented.

Member Fanning, dissenting, found that the employer's ch
in operations, causing employees represented by the union to
the work in question, was merely a paper change in its meth
billing and delivery of lumber, and that the loading of the lu
was performed as before, but with a different group of emplo
Noting that many strikes involve disputes over work assignm
but that that fact did not convert an otherwise lawful strike
an unlawful jurisdictional strike, he concluded that, by its pi
ing, the union sought to persuade the employer to return t
former mode of billing—a valid form of picketing to regain
jobs. Accordingly, Member Fanning would find that the un
picketing was solely for a work-preservation object and tha

dispute herein was not the type Congress intended the Board to resolve under sections 8(b)(4)(D) and 10(k) of the Act.

H. Publicity Handbilling

The second proviso to section 8(b)(4) exempts from the section's prohibitions, under certain specified conditions, truthful publicity, other than picketing, to the extent that a product produced by an employer with whom a labor organization has a primary dispute is distributed by another employer.[129] The intent of this publicity proviso has been held to permit a consumer boycott by publicity other than picketing of a neutral employer's entire business and not merely a boycott of the product involved in the primary dispute.

In determining the scope of the protection afforded by this second proviso to section 8(b)(4), the Board was faced with construing the requirement that the publicity be "for the purpose of truthfully advising the public."

In *Delta Air Lines,*[130] the charging airline had subcontracted its janitorial work to an employer with whom the union had a contract. After the airline lawfully terminated the subcontract, it contracted the work to a nonunion employer. It was stipulated that the union had a primary dispute with the nonunion janitorial firm, but not with the airline, the secondary neutral employer. In the furtherance of this primary dispute with the new janitorial firm, the union distributed handbills at the secondary employer's premises urging a consumer boycott of the secondary.[131] These handbills also contained information relating to the accident and consumer complaint record of the neutral airline. The union published copies of certain of these handbills in two of its newspapers distributed to members. The Board majority found that all of the coercive information contained in the publicity must be for the purpose of truthfully advising the public of the nature of the primary dispute, and that additional information which is coercive and which attacks a secondary employer for reasons unrelated to its role in the primary dispute is violative of section 8(b)(4)(ii)(B). They found that the coercive accident and consumer complaint information was totally unrelated to the primary dispute, tended to be misleading as to the nature of the primary dispute, and was not the type of coercive information addressed under the proviso.[132]

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[129] The second proviso reads:

> That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution . . . .

[130] *Hospital & Service Employees Union, Service Employees Intl. Union, AFL-CIO, Loc. 399 (Delta Air Lines),* 263 NLRB 996 (Chairman Van de Water and Members Fanning and Hunter; Members Jenkins and Zimmerman separately concurring in part and dissenting in part).

[131] The Board unanimously found that those handbills which did not identify the primary employer with whom the union had a dispute violated sec. 8(b)(4).

The majority also found that publication of the handbills in the union newspapers was similarly violative of section 8(b)(4)(ii)(B) of the Act, pointing out the specific reference in the proviso language that the term "public" included members of a labor organization. Finally, they rejected the constitutional First Amendment arguments raised by the union, with respect to information addressed under the proviso on the ground that the Board would presume the constitutionality of the Act, absent binding court decisions to the contrary.

While agreeing with the majority that the distribution of the handbills violated section 8(b)(4)(ii)(B), Member Jenkins, in his partial dissent, concluded that the publication of the handbills in the union's newspapers did not have a reasonably foreseeable consequence of drawing a neutral employer into a labor dispute not its own, and that the publications limited impact on the neutral's business was trivial. Accordingly, he argued that the publication of the handbills could not be said to be coercive within the meaning of section 8(b)(4)(ii)(B) and also concluded that Congress did not intend section 8(b)(4)(ii)(B) to reach the publication of information and admonitions in a union's own newspaper.

Member Zimmerman, also dissenting in part, stated that once a union identifies the primary employer with whom it has a dispute, and the primary's relationship with the secondary employer, it may also include additional truthful information related solely to its request for a consumer boycott. He pointed to the absence of language in the proviso that the publicity be "related to" the primary dispute, and indicated that he could find no basis for the majority's embellishment of the proviso language to prohibit the union from bolstering its appeal for a boycott of a secondary employer with additional truthful material. Accordingly, Member Zimmerman dissented from the Board's finding that the circulation of the handbills with consumer and safety information constituted a violation of the Act.

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[132] The Board majority noted that the inclusion of noncoercive, but related, information would not have removed the handbills from the proviso protection.

I. Picketing of Health Care Institutions

Included in the 1974 amendments to the Act, which expanded the Board's jurisdiction to cover health care institutions, was one new unfair labor practice section, section 8(g), which provides that before "engaging in any strike, picketing, or other concerted refusal to work at any health care institution," a labor organization must give 10 days' notice in writing of its intention to engage in such action to both the institution and the Federal Mediation and Conciliation Service. A longer notice period, that required by section 8(d)(B) of the Act, applies in the case of bargaining for an initial agreement following certification or recognition. Under an amendment to section 8(d), any employee who engages in a strike within the notice period provided by either that section or section 8(g) loses "his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act . . . ."

In *Eden Park Nusing Home,*[133] a majority of the Board held that sympathy picketing at a health care institution was unlawful in the absence of separate section 8(g) 10-day notices to the institution and to the FMCS in advance of a strike. In that case a union, after giving timely 8(g) notices, went out on strike against a health care institution. At the commencement of the strike and on other dates during the next 2 months, an officer and two business agents of a second union, which did not represent any employees at the institution, joined the picket line in sympathy, without providing the 8(g) notices. The admitted purposes of this sympathy picketing was to lend support and assistance to, as well as to generate publicity for, the striking employees. The majority found that the sympathy picketing by the second union violated section 8(g) of the Act, relying on the Board's earlier holding in *Parkway Pavilion Healthcare,*[134] that the 8(g) notice requirement regarding "any strike, picketing, or other concerted refusal to work at any health care institution," required separate notices in advance of sympathy picketing. Accordingly, the majority concluded that compliance with the 8(g) notice requirements was not negated by the fact that the second picketing union did not represent employees at the institution or that compliance by one union fulfilled the statutory notice requirement for the other union which later joined the dispute.

Members Fanning and Zimmerman, dissenting, argued that the sympathy did not broaden the dispute or change the character of the strike, or the picketing activity, generate any new or expanded pressure on the employer, or pose additional or expanded threats to the institution's ability to care for the well-being of its patients. Accordingly, they would have reaffirmed and adopted Member Fanning's and former Chairman Murphy's dissent in *Parkway Pavilion Healthcare, supra,* where they stated that it would be a distortion of Congress' intent to require the second union to supplement the 10-day notice previously given by the first union, with a further notice of its own.

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[133] *Local 200, General Service Employees' Union, S.E.I.U., AFL–CIO (Eden Park Management d/b/a Eden Park Nursing Home & Health Related Facility),* 263 NLRB 400 (Chairman Van de Water and Members Jenkins and Hunter; Members Fanning and Zimmerman dissenting).

[134] *Dist. 1199, Natl. Union of Hospital & Healthcare Employees, RWDSU, AFL–CIO (First Healthcare Corp., d/b/a Parkway Pavilion Healthcare),* 222 NLRB 212 (1976).

J. Remedial Order Provisions

1. Appropriateness of Bargaining Orders

During the report year, the Board considered whether to issue a *Gissel* [135] bargaining order to remedy an employer's unfair labor practices where there was no evidence in the record to establish that the union had previously enjoyed majority support among the unit employees.

In the lead case, *Conair Corp.,* [136] the administrative law judge found that the employer committed extensive unfair labor practices from early April through the election on December 7, 1977, that the unfair labor practices were so "outrageous" and "pervasive" as to fall within the first category of unfair labor practices cases described in *Gissel, supra,* and that the employer's conduct presented the "exceptional" case where the coercive effect of the unfair labor practices could not be eliminated by the application of traditional remedies, with the result that a fair and reliable election could not be had. In reversing the administrative law judge, the majority noted that although the Court indicated in *Gissel, supra,* that a first category case justified the issuance of a remedial order "without need of inquiry into majority status on the basis of cards or otherwise," the administrative law judge found that the union had failed to establish that it had at any time obtained a clear showing of support from a majority of the employer's employees and therefore declined to recommend that the employer be ordered to recognize the union. In so doing, he discussed the Board's decision in *United Dairy Farmers Cooperative Assn. (United Dairy I)* [137] and noted that there the Board presented with similar facts, but nevertheless had declined to issue a bargaining order because the union therein had failed to obtain a card majority.

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[135] *N.L.R.B.* v. *Gissel Packing Co.,* 395 U.S. 575 (1969).

[136] 261 NLRB 1189 (Members Fanning, Jenkins, and Zimmerman; Chairman Van de Water and Member Hunter dissenting).

[137] 242 NLRB 1026 (1979).

Subsequent to the issuance of the administrative law judge's decision herein, the United States Court of Appeals for the Third Circuit enforced the Board's order in *United Dairy Famers Cooperative (United Dairy I)*[138] and further found that the Board possessed the authority to issue a nonmajority bargaining order in exceptional cases where an employer's "outrageous" and "pervasive" unfair labor practices eliminated any reasonable possibility of holding a free and uncoerced election. The court therefore remanded the case and directed the Board to consider whether a bargaining order should be issued. The Board accepted the remand and in *United Dairy II,*[139] found that the employer's outrageous and pervasive unfair labor practices had completely foreclosed the possibility of a fair election and that, therefore, even though the union had failed to demonstrate majority support, a bargaining order was warranted and justified.

In light of this precedent, the Board majority carefully reviewed the facts of the instant case and concluded that there could be no doubt of the extreme gravity of the employer's violations of the Act. In particular, it engaged in numerous discriminatory discharges which were serious unfair labor practices going "to the very heart of the Act" and having a lasting coercive impact on employees. The employer discharged all unfair labor practice strikers within 3 weeks of learning about the union's nascent organizational campaign in April, imparting in dramatic fashion the unmistakable message that loss of employment was the price to be exacted for the exercise of section 7 rights. In subsequent months, the employer reinforced and embellished this coercive message by repeatedly threatening discharge, by discriminatorily delaying reinstatement of other strikers, by discriminatorily discharging reinstated strikers, and by repeatedly threatening plant closure in retaliation against the union's campaign. Moreover, these unfair labor practices were only the most serious among the many committed by the employer.

The Board majority noted that the employer's unlawful conduct carried its coercive message to every employee in the relatively large unit and that its highest executive officials openly committed many unfair labor practices, enhancing the impression of a centrally coordinated, companywide plan to deny employees their section 7 rights and increasing the likelihood that all employees would understand and credit any threats made. In addition, officials at all levels of the employer's managerial hierarchy utilized mass communications with employees to insure maximum dissemination of unlawful threats, solicitation of grievances, and promises of benefits.

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[138] 633 F.2d 1054 (1980).

[139] 257 NLRB 772 (1981) (Chairman Fanning and Members Jenkins and Zimmerman).

Finally, the majority found that both the repetition and timin of the employer's unfair labor practices exacerbated their long term coercive impact. They noted that while the chilling effect o employee rights of a single discharge or threat of plant closure wa difficult enough to erase, several repetitions of these and other violations of the Act multiply the strength and duration of the impression left on employees. The Board majority also found that th same multiplier effect resulted from the manner in which the employer timed its unlawful conduct; i.e., swift and severe initial retaliation against the union's organization efforts, a lengthy campaign of unfair labor practices, an increase in violations as th election neared, and two unlawful discharges even after the election. In moment and duration, the Board majority also conclude that the timing of the employer's unfair labor practices underscored its enduring resolve to oppose unionization by any mean and deeply imprinted on employee memories the drastic consequences of seeking union representation.

In the majority's view, it was clear that this case was the "exceptional" type envisioned in *Gissel* which warranted the issuance of a remedial bargaining order "without need of inquiry into majority status on the basis of cards or otherwise." They concluded that neither the traditional remedies nor even the extraordinary access and notice remedies could effectively dissipate the lingering effects of the employer's massive and unrelenting coercive conduct. By its conduct, the employer had foreclosed any possibility of holding a fair representation election. Under these exceptional circumstances, the Board majority found that a remedial bargaining order was the only way to restore to employees their statutory right to make a free and uncoerced determination whether they wished to be represented in collective bargaining by a labor organization. Anything short of a bargaining order would deny employees that right which has been the hallmark of national labor policy for nearly five decades.

The majority categorically rejected the dissents' arguments that either the Act or Board policy bars issuance of a nonmajority bargaining order, asserting that the dissenters' view of the Board's remedial authority lacked any direct judicial support and erred by focusing so narrowly and abstractly on the principle of majority rule. While agreeing that majority rule is, unquestionably, an important feature of the Act, the majority stated that this principle has never been interpreted as standing in supreme isolation from the Board's other statutory policies and purposes.

Furthermore, they rejected the dissenters' assertion that their position best protected the principle of majority determination. The majority stated that since neither position could state with complete certainty whether a majority of the employees actually desired representation by the union prior to the onset of the employer's unfair labor practices, nor predict with total certainty the outcome of the union's organizational campaign if the employer had not repeatedly and illegally interfered. Thus, to the majority, it was of paramount significance that, but for the employer's unlawful conduct, its employees would have had the opportunity to express openly their opinions about unionism and to resolve the representation debate by making a free and uncoerced majority choice in a Board-conducted election. By its massive and numerous violations, the employer had destroyed any opportunity for free and open debate of the representation question.

While noting that whether or not bargaining was ordered, the employees will have lost their right to select a bargaining representative by virtue of the employer's unfair labor practices, the majority recognized that the right to reject representation must be balanced against the right to select representation. Striking this balance, the majority found that a remedial bargaining order, rather than the remedies advocated by the dissent, would best vindicate the employees' right of self-determination and that no other remedy would as quickly and effectively provide the opportunity for employee free choice which the Act mandates the Board to protect. In so finding, the majority noted that the risk of even temporarily contravening the wishes of an employee majority was lessened by the union's quondam card showing of support from approximately 46 percent of the employer's employees. However, they also stated that they would not necessarily withhold a bargaining order in the absence of some affirmative showing of a reasonable basis for projecting a union's majority support because the critical predicate to issuance of a nonmajority bargaining order is the Board's finding that an employer's unlawful conduct fits the *Gissel* catetory 1 description. The majority noted further that the bargaining order was not permanent, but only of an interim character, and that the employees, if dissatisfied with the union's representation of them after the effects of the employer's acts have worn off, could oust the union through the decertification process. Accordingly, the majority concluded that, if an employer's "outrageous" and "pervasive" unfair labor practices have completely foreclosed the possibility of a fair representation election, the Board will issue a nonmajority remedial bargaining order because it is the only effective means of restoring employees' representational rights.

Chairman Van de Water, dissenting in part, agreed with forme
Member Penello that the "[h]oldings of the Supreme Court, th
plain words of the statute, and its legislative history . . . establis
that the Board's remedial authority is limited by the majority rul
doctrine." [140] Chairman Van de Water also argued that, even i
the Board did not lack the requisite statutory authority, he coul
not conclude that employee free choice is best effectuated by impos
ing a labor organization upon employees without their consent, al
though he would join his colleagues in granting herein extraordi
nary remedies other than a bargaining order. He also agreed wit
former Member Penello that, even under the interpretation o
Gissel most favorable to the majority, all that can fairly be said i
that the Court left open the issue of whether the Board has th
statutory authority to issue a bargaining order in the absence of
showing that the union even enjoyed majority support. Chairma
Van de Water completely agreed with former Member Penello'
conclusion, after a review of the statute's provisions, particularl
section 9(a), the Act's legislative history, and interpretative S
preme Court decision, that if a labor organization is to become
bargaining representative in the absence of a showing of majorit
support, the decision must be made by Congress, the body whic
constructed the Act with the majority rule principle as its found
tion. The Chairman also respectfully expressed his disagreemen
with the Third Circuit's decision in *United Dairy*, because it co
flicted with the clear terms of the statute and misconstrued S
preme Court precedent. In analogizing the issuing of a bargainin
order in the *United Dairy* case to the issuing of such an order i
Gissel, he argued that the Court overlooked a fundamental diffe
ence between the two cases. In *Gissel*, the Supreme Court emph
sized that a bargaining order would serve "to re-establish the co
ditions as they existed before the employer's unlawful campaign
(395 U.S. at 612.) Unlike the situation in *Gissel*, the union
United Dairy I never achieved majority status and thus a bargai
ing order would not restore the *status quo ante*. Rather the cou
speculated over the likelihood that the employees would ha
chosen the union to represent them in the absence of the emplo
er's extensive unfair labor practices. In the Chairman's view, su
speculation on the part of the court did not comport with the stat
tory requirement of section 9(a) that unions in fact be "designat
or selected" by a majority of employees.

Finally, the Chairman noted that the validity of the Third C
cuit's *United Dairy* decision had been called into question by t

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[140] *United Dairy Farmers Cooperative Assn. (United Diary I)*, 242 NLRB 1026, 1039 (19
(Member Penello concurring in part and dissenting in part), remanded 633 F.2d 1054 (3d
1980), decision on remand 257 NLRB 772 (1981).

District of Columbia Circuit Court in *Haddon House*[141] where it stated that it did not share the Third Circuit's "confidence that the Board's authority is so broad" and where it found that a serious threat to employee freedom of choice would be posed by a governmental body's bypassing the employees altogether, and imposing a bargaining representative merely on the basis of its own assessment of the employees' needs.[142]

In conclusion, the Chairman found that the majority's decision offended the congressional intent clearly expressed in the statute and in the legislative history that bargaining representatives are to be selected by the majority. He asserted that such a decision was alien to those values recognized as uniquely American and added that "when a governmental body in Washington imposes upon its constituents a labor organization not of their own choosing we have drifted far from this Nation's democratic ideals."

Member Hunter dissenting, in part, noted that he shared with the Chairman a deep concern that the course which the majority had charted for the Board was one that was proscribed by the statute itself, and that he was convinced that there were important policy reasons not to eschew the principle of majority rule and issue a bargaining order where no majority status has ever been demonstrated.

He first argued that undercutting the principle of majority rule by issuing a nonmajority bargaining order could serve only to diminish the heretofore widely held public view of the Board as an impartial agency that protects the employees' *right* to choose under section 7 of the Act, but does not make that choice *for* employees. He also found that speculation and guesswork about the sentiment of a majority of the employees were no substitute for objective evidence of majority status and were simply not a proper basis for imposing on employees a bargaining agent not of their choosing.

Similarly, Member Hunter was not persuaded by the contention that, had this employer refrained from some unlawful act or combination of acts, these employees surely would have registered their majority support for the union. In his view, such an argument also turned on pure speculation. The outcome of organizational campaigns was unpredictable at best, and they were subject to ebb and flow in employee sentiment that, as often as not, has little to do with conduct, lawful or otherwise, engaged in by one of the parties. He further argued that to punish the wrongdoer and "vindicate" employee rights by imposing a bargaining order merely exacerbates the damage done to employees' rights by assuming the critical fact of majority status and imposing the bargaining agent on employees who might well have rejected representation *even* in the absence of any employer misconduct.

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[141] *Teamsters Loc. 115, a/w Teamsters [Haddon House Food Products & Flavor Delight]* v. *N.L.R.B.*, 640 F.2d 392 (1981), cert. denied 102 S. Ct. 141.

[142] *Id.* at 397, fn. 7.

Member Hunter also found it equally important to consider what objective or subjective standard or standards would be applied to determine whether the facts of any particular case warranted application of a nonmajority bargaining order remedy and he believed that the majority itself conceded that it could devise no "bright line" test for the application of a nonmajority bargaining order remedy. Further, pointing to recent experience with circuit court criticism of the Board's issuance of the usual *Gissel* bargaining order, he was of the view that the current majority or some like-minded majority of the Board in the future could dilute those standards in future cases, perhaps to the point where the exceptional remedy becomes the commonplace remedy of tomorrow.

Finally, Member Hunter stated that his unwillingness to join in a nonmajority bargaining order should not be understood as insensitivity to the serious misconduct which occurred or as a lack of concern for providing a full and effective remedy because, with one exception, he joined in the majority's substantive findings of violations, and in granting extraordinary remedies other than a bargaining order. However, unlike the majority, he was satisfied that the extraordinary remedies granted in the case were sufficient to provide an adequate remedy for the wrongdoing in issue, while ensuring that the right to choose, guaranteed to employees under section 7 of the Act, was not trenched upon by either the employer or the Board.

In *United Supermarkets,*[143] the administrative law judge determined that the evidence failed to demonstrate that the union had obtained signed authorization cards from a majority of the unit employees, and, citing *United Dairy I, supra,* concluded that a bargaining order was inappropriate and ordered a second election. The General Counsel and the charging party excepted, contending that the employer's conduct was so serious and substantial as to warrant the imposition of a remedial bargaining order irrespective of whether the union had demonstrated support from a majority of the employees.

After examining the facts of the case, the Board majority concluded that the employer's unlawful conduct, while extensive and serious, did not rise to the "exceptional" level requiring a bargaining order where no card majority was found to exist as was the situation in *United Dairy II, supra,* and *Conair, supra.* The majority pointed out that efforts to organize the employees began in late May 1977, and the employer's unlawful reaction thereto began around mid-June. Between July 25 and September 26, it discriminatorily discharged 7 employees and committed approximately 31 additional independent violations of section 8(a)(1) which included interrogations, creating the impression that employees' activities were under surveillance, soliciting employees to spy on union activities, promulgating an unlawful no-solicitation rule, threatening losses of jobs and more onerous working conditions, warning the employees that selecting the union would be futile, and promising them improved wages and benefits if the union were rejected.

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[143] 261 NLRB 1291 (Members Fanning, Jenkins, and Zimmerman; Member Hunter concurring; Chairman Van de Water concurring in part and dissenting in part).

Despite the unfair labor practices, in the union won the August 26 election in the meat department, but lost the December 7 election in the grocery department. While recognizing the gravity of such disregard for employee rights by setting aside the December 7 election held in its aftermath and ordering certain extraordinary access and notice remedies, the majority did not believe that the totality of the employer's conduct had completely foreclosed the possibility of holding a fair election and, accordingly, concluded that the violations in the instant case did not warrant a nonmajority bargaining order.

The Board majority noted that a number of factors which differentiated the situation in *Conair, supra,* led them to this conclusion. Unlike the situation in *Conair, supra,* the employer's illegal activity subsided well in advance of the December 7 grocery unit election. The last two unlawful discharges occurred in late September, more than 2 months before that election, and most of the unlawful activity took place in July, prior to the August 26 meat department election which the union won. Thereafter, the employer waged a less aggressive campaign against the grocery unit unionization, despite the union's victory in the earlier election. They also noted that this case differed from *Conair* in that there were no captive-audience speeches, no mass appeals to employees, no wholesale retaliatory terminations, and no orchestrated escalation of antiunion activity. Instead, most of the violations involved individual encounters between a single supervisor and a single employee. While the majority did not discount the seriousness of a first-line supervisor's remarks linking unionization to possible job displacements, they recognized that the impact of such remarks was less severe than a higher management official's threat to close down an entire plant. In addition, they pointed out that the impact of the employer's unfair labor practices was also diffused in the case because seven different facilities located in the area were involved and that such geographic separation would tend to lessen the effect that the sheer number of violations would otherwise suggest.

In brief, the Board majority concluded that while the circumstances herein presented serious and rather widespread unfair labor practices, these unfair labor practices differed significantly in gravity, extent, and timing from those found worthy of a nonmajority bargaining order in either *United Dairy II, supra,* or *Conair, supra.* In each of those cases, the majority noted that the employers waged unrelenting and massive coercive efforts, demonstrative of their complete and total disregard for employees' rights and that they were "exceptional" first category *Gissel* cases where it was unnecessary to inquire into majority status. Finding that the instant case fell short of this level, the Board majority, guided by the fact that no card majority was found to have existed in favor of union representation, decided to issue no bargaining order.

Member Hunter concurred in the decision not to issue a bargaining order, but did so in reliance on his separate opinion in *Conair* where he stated that he would not issue a bargaining order where, as here, the union never attained majority status.

Chairman Van de Water also concurred in the decision not to issue a bargaining order, relying on his separate opinion in *Conair* where he stated that, for both statutory and policy reasons, he would not issue a bargaining order where, as here, the union never enjoyed majority status. The Chairman further dissented from the majority's decision not to order additional extraordinary remedies upheld by the District of Columbia Circuit Court in *Haddon House, supra.*[144]

In *Paul Distributing Co.,*[145] a Board panel, affirming the administrative law judge's determination not to grant the union a nonmajority bargaining order, also refused to issue a nonmajority bargaining order in accordance with the decisions in *Conair, supra,* and *United Supermarkets, supra.* Applying the principles enunciated in those cases, it concluded that the gravity, duration, timing, and repetition of the employer's unfair labor practices, although serious and committed within a small employee unit, were not so outrageous and pervasive as to foreclose completely the possibility of a fair election and to warrant a bargaining order.

The panel pointed out that unlike *Conair,* where the Board imposed a nonmajority bargaining order, there were no captive-audience speeches, no mass appeals to employees, no acts of surveillance, no wholesale retaliatory terminations, and no orchestrated escalation of antiunion activity. Further, the 8(a)(1) violations, although serious and including a threat of plant closure, occurred only on the 3 days immediately after the employer learned of its employees' union activities, and involved almost exclusively single encounters between one of the employer's owners and individual employees. These violations were not repeated and did not continue beyond June 19, 2 days after the union made its demand for recognition.

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[144] 640 F.2d 392.

[145] 264 NLRB 1378 (Members Fanning, Jenkins, and Zimmerman).

As with the 8(a)(1) violations, the panel found that the unlawful layoffs on July 3 of two employees, one of whom was known by the employer to be the instigator of the organizing effort, did not foreclose the possibility of holding a fair election among the unit employees. It noted that the coercive effect caused by the layoff of that active union adherent was mitigated by the employer's recalling him on July 8. Further, although the employer recalled the other laid-off employee only to drive on vacation routes for a few weeks during the summer, the panel did not believe that his layoff and the employer's other unfair labor practices collectively had the kind of lingering effect on other employees which would warrant a bargaining order absent a showing of majority support by the union.

In the report year, the Board considered other issues related to remedial bargaining orders. In *Carbonex Coal Co.,*[146] the panel agreed with the administrative law judge that the employer, a strip mining company, had violated section 8(a)(1), (2), (3), and (5) of the Act by (1) granting recognition to the International Union of Operating Engineers, Local 627, AFL–CIO, herein Local 627, as the exclusive collective-bargaining representative of employees at its newly opened Defiance Mine, prior to the hiring of any employees at the mine; (2) by giving effect to the union-security and hiring hall provisions of the collective-bargaining agreement with Local 627, including referring employee applicants to Local 627's hiring hall prior to their employment and refusing to employ any applicants who had not been referred by Local 627; (3) by discriminatorily closing, in part, its Roger Mine, where the employees were represented by the United Mine Workers, herein UMW; and (4) by transferring Roger Mine unit work to the Defiance Mine without notifying the UMW, and without affording it an opportunity to bargain with respect to the transfer.

The panel agreed with the administrative law judge's recommended order in its entirety, including the requirements that the employer withdraw and withhold all recognition from Local 627, as the bargaining representative of employees at the Defiance Mine, and that the employer recognize and bargain with the UMW as the exclusive representative of employees at the Defiance Mine. It found the recommended Order appropriate and necessary to remedy the employer's unfair labor practices because (1) the employer had committed serious and extensive unfair labor practices; (2) a majority of Roger Mine employees would in all likelihood have transferred to the Defiance Mine had the employer not violated the Act; (3) the remedy reasonably restored the approximate *status quo;* and (4) any lesser remedy would have been ineffectual.

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[146] 262 NLRB 1306 (Members Fanning, Jenkins, and Zimmerman).

The panel noted that the employer had committed pervasive violations of the Act, all directed toward depriving the UMW of its right to represent employees at the Roger Mine, (1) including unlawfully refusing to notify and bargain with the UMW about the transfer of unit work from the Roger Mine to the Defiance Mine; (2) discriminatorily accelerating the opening of the Defiance Mine; and (3) discriminatorily transferring employees represented by, and hiring employees, through the hiring hall of Local 627, to work at the Defiance Mine without calling unit employees. In addition, the employer prematurely recognized Local 627 as the bargaining representative at the Defiance Mine; unlawfully extended its bargaining agreement with Local 627 to the Defiance Mine and entered into a successor bargaining agreement with Local 627 both containing union-security, checkoff, and hiring hall provisions; and unlawfully required employee applicants for the Defiance Mine to use Local 627's hiring hall. The panel found that these multiple violations of section 8(a)(1), (2), (3), and (5) of the Act warranted the extensive remedy recommended by the administrative law judge.

In finding that the extensive remedy recommended was warranted, the panel pointed out that, although the mine workers at the Roger Mine were on an unfair labor practice strike when the Defiance Mine opened, there was a sufficient number of these employees who had been laid off or who had applied for reinstatement to constitute a majority of the ultimate employee complement at the Defiance Mine. Further, noting that the Defiance Mine was only 5 miles or less from the Roger Mine and that equipment and managerial personnel were transferred from the Roger Mine to the Defiance Mine, the panel concluded that employees from the Roger Mine, in the normal course of business, would be expected to be transferred to the Defiance Mine. The panel also found that since the employer's unfair labor practices prevented, obstructed, and effectively prohibited such transfers of employees, it was extremely probable that, absent the employer's unfair labor practices, Roger Mine employees would have transferred to the Defiance Mine in sufficient number to constitute a majority of employees at the Defiance Mine. Because the collective-bargaining unit would follow such transfer of equipment and personnel, the employer would be obligated to bargain with the UMW at the Defiance Mine as the recommended Order required.

Observing that there could be no certitude here, the panel recognized that the lack of certainty was caused by the employer's unfair labor practices, the nature of which prevented complete restoration of the *status quo ante*. In all likelihood, had there been no violations of the Act, the UMW would have been the lawful bargaining representative at the Defiance Mine. Acknowledging that Local 627, which was the bargaining representative at other of the employer's mines, was adversely affected by the Order, the panel determined that it was highly improbable that Local 627 would have achieved representative status at the Defiance Mine absent the employer's unfair labor practices, and, furthermore, that one labor organization should not benefit, however fortuitously, from unfair labor practices directed at another.

The panel also found that, owing to the nature of the employer's strip mining operations, the recommended Order was necessary to provide an effective remedy. The economically recoverable coal at any one mine was limited, and, therefore, to stay in business, the employer had to periodically open new mining operations. Thus, in the normal course of business, the panel concluded that the employer would be expected to transfer both equipment and personnel from the depleted mine to the new operation. Where, as here, the new mine was opened in relatively close proximity to the old mine, employees at the old mine would be expected to transfer to the new mine. The panel determined that this was what in all likelihood would have happened if the employer had not unlawfully prohibited it, and that this was the *status quo ante* which the recommended Order restored.

In *Exchange Bank*,[147] the administrative law judge found that the Exchange Bank Collective Bargaining Group, herein called the Group, a labor organization formed by the employer's employees, had affiliated with a local of the International Association of Machinists and Aerospace Workers, AFL–CIO, herein called IAM, and that, consequently, a bargaining order, which he deemed necessary and appropriate in light of the employer's numerous and serious unfair labor practices, should issue on behalf of the IAM and should be made effective as of February 26, the date on which the Group made its demand for recognition on the employer, rather than on April 25, the date the IAM made its demand for recognition. The Board disagreed with the administrative law judge's finding of affiliation, but agreed that the employer should be ordered to bargain with the IAM, since the IAM had been designated by a clear majority of employees as their bargaining representative.

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[147] 264 NLRB 822 (Chairman Van de Water and Members Fanning, Jenkins, Zimmerman, and Hunter).

The relevant facts revealed that, during the latter part of February, the employer's employees, dissatisfied with wages and working conditions, began an organizational drive which, on February 25, led to the formation of the Group. On that day, 9 of the employer's 12 unit employees signed authorization cards authorizing the Group to represent them for collective-bargaining purposes with the employer. The next day, February 26, the Group requested that the employer recognize and bargain with it. The employer, by letter dated March 7, declined to recognize the Group, choosing instead to continue on a course of unlawful conduct which began on February 22 and continued into late June. Because of the Group's inability to obtain recognition and adequately to represent their interests, the employees contacted the IAM and became convinced that the IAM would be more successful in representing them. At an April 10 meeting to which all the members were invited to attend eight of the Group members passed a resolution which effectively dissolved the Group as a labor organization and which purportedly caused the Group to affiliate with the IAM. Immediately thereafter, these eight employees signed authorization cards on behalf of the IAM, thus giving the IAM majority support in the unit. Having obtained this majority support, the IAM, on April 25, requested the employer to recognize and bargain with it. On April 30, the employer refused to recognize the IAM, persisting instead in its previously charted unlawful conduct.

On the basis of these facts, the Board found, contrary to the administrative law judge, that no affiliation occurred. Rather, according to the Board, the evidence showed that, when the Group failed to obtain recognition from the employer, the employees who had supported it sought more effective representation, and thereafter disbanded and dissolved the Group upon determining that the IAM could better serve their representational needs. As of the moment that the employees passed a resolution explicitly dissolving the Group, it ceased to exist as a labor organization. In the Board's view, the fact that the resolution stated a desire to "affiliate" with the IAM was of no consequence in light of the Group's dissolution *and* the employees' execution of authorization cards on behalf of the IAM. By these two acts, it was apparent that what actually occurred was not an affiliation of one union with another, but rather the repudiation by the unit employees of the labor organization they had created for a more established and experienced one. Under these circumstances, the Board found that the IAM became the collective-bargaining representative of the employer's employees when a majority of the employees signed valid authorization cards, not by virtue of the purported affiliation which did not occur.

Accordingly, the Board ordered that the employer bargain with the IAM as of April 25, the date upon which the IAM made its demand for recognition, rather than February 26, the date the Group made its demand.

2. Backpay Computations

In *Woonsocket Health Centre,*[148] the General Counsel's backpay specification set out the gross backpay allegedly owing to two discriminatees, along with interim earnings and expenses known to the General Counsel through correspondence with the two discriminatees who were then residing in Florida, who were not subpoenaed by either the General Counsel nor the employer, and who were not present at the backpay hearing. The administrative law judge found that too many factual uncertainties remained as to the amount of backpay due these two discriminatees because of their failure to appear and testify. He therefore refused not only to issue a backpay award, but also to order that an estimated award, as set out in the specification, be placed in escrow. Instead, he granted the two discriminatees 1 year within which to communicate with the Board's regional office, at which time the General Counsel could issue a correct specification and arrange for a reopened hearing. The panel majority reversed, noting that the administrative law judge had resolved the uncertainties against the discriminatees and had placed the burden on them, and at least implicitly on the General Counsel, to establish the amount of net backpay due the discriminatees. Thus, the majority disagreed with his resolution and found merit in the General Counsel's exception to the failure of the administrative law judge to place the estimated amount of backpay due in escrow, as required by Board policy.

The majority stated that once the maximum backpay figure has been determined based on the amount a discriminatee would have earned in the absence of discrimination by the employer, the burden is on the employer to demonstrate that its backpay liability should be some amount less than that figure. They also stated that the General Counsel did not have the obligation to produce the discriminatees at the hearing to testify, and further pointed out that, although the General Counsel informed the employer of the whereabouts of the discriminatees and advised that he would not be issuing subpoenas to the discriminatees, the employer did nothing on its own to assure their appearance at the hearing.

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[148] 263 NLRB 1367 (Members Fanning and Zimmerman; Chairman Van de Water dissenting in part).

Stating its unwillingness to assume that the discriminatees did not care enough about the matter to assert their rights, the majority found nothing to show that the discriminatees would have refused to appear in compliance with a subpoena from the employer. They also disagreed with the administrative law judge that the backpay specification was too uncertain factually to preclude the amounts set forth from being placed in escrow. While the employer contended that the discriminatees did not conduct an adequate search for interim employment and that they voluntarily removed themselves from the job market, the majority pointed out that the employer had not shown that the amount of gross backpay set forth in the specification was inaccurate, or that the interim earnings presented by the General Counsel were inaccurate.

Accordingly, the majority determined that, consistent with Board policy, they would award the discriminatees the amount of backpay set out in the specification, and order the employer to pay it to the regional director to be held in escrow for a period not exceeding 1 year from the date of the decision herein. They instructed the regional director to make suitable arrangements to afford the employer and the General Counsel an opportunity to examine the discriminatees and any other witnesses and to introduce any relevant and material evidence. The majority further ordered the regional director to make a final determination of the amount of the backpay due after making deductions of net interim earnings and other appropriate amounts, to return any amounts deducted from the backpay to the employer, and to report on the status of the matter to the Board no later than 1 year from the date of the decision herein.

Chairman Van de Water, dissenting in part, argued that the majority's escrow order was issued pursuant to a backpay specification which was based on incomplete and patently unreliable information as to the discriminatees' interim earnings. He pointed out that, as was noted by the administrative law judge, the original specification as to one discriminatee showed no earnings during her backpay period and was amended by the General Counsel at the hearing to show earnings during a certain period, although the General Counsel conceded that his information was incomplete. He observed that the specification also sought money for the other discriminatee's expenses for moving to Florida, as well as backpay for both discriminatees *after* they had moved to Florida and had clearly removed themselves from the labor market. The Chairman found a more fatal flaw in that the employer had raised the issue of whether either of the discriminatees had made a reasonable search for employment, and it was incumbent on the General Counsel to prove the claimants' entitlement to backpay by showing that they had conducted a reasonable search for employment. This the General Counsel failed to do. Citing the Second Circuit's decision in *N.L.R.B.* v. *Mastro Plastics Corp.*, 354 F.2d 170 (1965), which noted that the Board customarily produces discriminatees at backpay hearings, the Chairman concluded, like the court, that a rule requiring a discriminatee to testify before his award becomes final was not an undue burden on the Board and would not undermine the efficacy of the backpay remedy.

Noting that a backpay proceeding was not considered to be an advisory proceeding and that it was the General Counsel's responsibility to see that backpay determinations are correctly made, the Chairman suggested that the Board's existing offices in Florida be utilized to interview and depose the claimants and to work out the backpay claims based on that information. Finally, the Chairman stated that the majority opinion might serve as a disincentive to discriminatees in future cases to appear at backpay hearings, since they could receive excessive awards based solely on inadequate specifications. He believed that before awarding backpay to a discriminatee who is unavailable at the hearing, the General Counsel must present a complete backpay specification which was at least minimally credible, something which was not the case here.

In *Big Three Industrial Gas & Equipment Co.*,[149] the administrative law judge recommended that the discriminatee not receive the backpay sought for him because he did not disclose substantial interim earnings until counsel for the employer questioned him about those earnings on the witness stand during the backpay hearing. He found that the discriminatee's failure to report this additional interim income was not due to his "forgetfulness," but was due to the possibility of perjury charges. The administrative law judge reasoned that, unlike the recent decision in *Flite Chief*,[150] where the Board decided not to penalize a discriminatee who waited until just before the hearing to provide all relevant earnings information, this discriminatee had not "voluntarily" disclosed his interim earnings. Accordingly, he determined that the discriminatee should suffer a "penalty" for not revealing some of his interim earnings to the Board; i.e., denial of backpay from the date the discriminatee was first employed by the interim employer from whom the nondisclosed earnings were received until the interim earnings were revealed.

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[149] 263 NLRB 1189 (Members Fanning and Jenkins; Member Zimmerman concurring in part and dissenting in part).

[150] *Flite Chief; Richard Miller & Karen Miller; M & M Truckadero Coffee Shop, James Miller & Paul A. Minder*, 246 NLRB 407 (1979), enforcement denied in part 640 F.2d 989 (9th Cir. 1981).

In his exceptions to the Board, the General Counsel argued that the penalty imposed was unwarranted because the concept of a penalty in the instant circumstance had no place in the national labor law scheme, and that the instant case was unlike those involving fraud or deceit by a discriminatee which resulted in the Board's inability to determine from the record the actual amount of backpay owed. The panel majority found merit in the General Counsel's position. They stated that, in remedying unfair labor practices, the Board is concerned with public rights, detering future violations, and making whole individual discriminates and noted that the import of Board and court decisions is that the purpose and policy of the Act is remedial, not punitive in nature. In instances where a question has arisen over the entitlement to and the extent of backpay, the majority continued, the Board has sought to discharge its public obligations, not by condoning the failure of discriminatees to inform the Board fully of all interim earnings, but by recognizing that such accurate reporting is not always possible. They stated that even in situations where all interim earnings were not reported, no fraud or deceit on the Board or public is deemed to have been committed so long as the Board can determine with accuracy the backpay owed a discriminatee.

The majority pointed out that, in the instant case, the employer, not the discriminatee, had been adjudged the wrongdoer, and that at this juncture they were attempting as nearly as possible to make the discriminatee whole. Indeed, they observed that, were they to do otherwise, they would be rewarding the employer by allowing it to avoid the consequences of its unlawful conduct. Accordingly, the majority aruged, with due respect to the court's view in *Flite Chief*, even if the discriminatee was to be punished by withholding backpay, that was no reason to provide a windfall for an employer, and stated that in such cases, logic, equity, and the policy of the statute require that an employer in such circumstances be ordered to pay an amount equivalent to backpay to the Treasury.

Further, the majority thought that there were other considerations which weighed against adopting the administrative law judge's approach in evaluating the circumstances herein. Given that it was not unusual for the period covered by a backpay specification to stretch over many months or even years, and that discriminatees might hold a substantial number of jobs, some of short duration, during this period, they found it hardly surprising if a discriminatee kept less-than-perfect records and, perhaps through inadvertence, failed to report interim earnings from one or two jobs. In those circumstances, the majority concluded that it was particularly difficult to require an administrative law judge to speculate about the discriminatee's motive; i.e., whether the omission resulted from a deceitful intent or from inadvertent error, poor recordkeeping, or the like. Recognizing both the pressures faced by the discriminatees—pressures which resulted from a respondent's unlawful conduct—and the overriding remedial purpose of the statute, the majority preferred to resolve the matter by making the discriminatee whole in accordance with the corrected specification.

Member Zimmerman, joining his colleagues in all other respects, dissented from their determination that the discriminatee should be awarded full backpay. He found the majority's desire not to penalize the discriminatee and to protect the public right by vindicating the law against the one who had broken it, and their recognition that discriminatees perhaps through inadvertence could fail to report interim earnings, might be laudable considerations. However, he concluded, that they did not apply to the facts of the case, where the administrative law judge found that the discriminatee regularly lied and/or evaded questions and deliberately sought to conceal his interim earnings. Member Zimmerman pointed out that, although the administrative law judge recognized that most discriminatees do not intentionally conceal interim earnings, but through honest forgetfulness fail to report some earnings, he found that this discriminatee was not a credible witness but was waiting to determine what the employer knew before he revealed his earnings.

In these circumstances, Member Zimmerman found that the withholding of full backpay could not be a "penalty" beyond the power of the Board to impose and that a denial of full backpay would effectuate the policies of the Act. He identified two considerations at issue: the remedy of the employer's unfair labor practices and the administration of Board compliance proceedings consistent with the public interest. Thus, he found that while it was important that the employer not be allowed to avoid the consequences of its unlawful conduct, it was equally important, as the *Flite Chief* court found, that a discriminatee not be rewarded "for his perfidy as opposed to discouraging such claimants for perverting an order issued in their and the public interest into a scheme for unjustifiable personal gain." (640 F.2d at 993).

While denying the discriminatee full backpay, Member Zimmerman would not adopt the administrative law judge's recommendation but would withhold backpay for each calendar quarter in which concealment of employment occurred, rather then cutting

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backpay off from the date of the discriminatee's first concealed interim earnings until they were revealed. In his view, computing backpay in the former manner would accomplish the dual purpose of discouraging the employer from committing future unfair labor practices and discouraging discriminatees from abusing the backpay process for their own personal gain.

In *Canova Moving & Storage Co.*,[151] the panel found merit in the General Counsel's exception to the administrative law judge's inclusion, as interim earnings for the purposes of calculating the employer's backpay liability to the discriminatee, any portion of the awards made in favor of the discriminatee by the California Workers' Compensation Appeals Board (CWCAB) as a result of back injuries which he sustained while employed by the employer as a driver engaged in the moving of household goods.

The discriminatee was employed by the employer from May 1974 until January 5, 1976, when he was unlawfully discharged. Meanwhile, in 1975, he had sustained three job-related back injuries, the last of which occurred in September and rendered him unable to work for almost 3 weeks. During this recuperative period, he received temporary total disability indemnity. The discriminatee returned to work in October and remained continuously employed until his unlawful discharge. Thereafter, during 1976 and 1977, he gained interim employment on an intermittent basis, masking, when necessary, the discomfort he experienced which resulted from his prior injuries. In 1977, he also initiated three workers' compensation claims based on the 1975 episodes mentioned above. Pursuant to the employer's request, the discriminatee was examined by a chiropractor who concluded that he had "residual partial permanent disability which would preclude heavy lifting, repetitive bending or stooping, and heavy work." After a hearing, the CWCAB, on September 19, 1978, determined that the injuries in question had caused the discriminatee's permanent disability, and awarded him over 91 weeks of permanent disability indemnity.

In assessing the controversy over how much, if any, of the awards might be offset as interim earnings from backpay otherwise due the discriminatee, the panel stated that the administrative law judge had correctly observed that workers' compensation payments were deductible insofar as they constituted payment for wages lost by a discriminatee during a backpay period; but, to the extent that such payments constituted reparation for physical damage suffered, they were, as a collateral benefit unrelated to wages, excluded from the computation of interim earnings. The resolution of the controversy required that the nature of the payments made to the discriminatee under the awards be determined. The panel found the answer to this question in *Russell* v. *Bankers Life Co.,*[152] where the court stated, *inter alia:*

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[151] *John J. Canova d/b/a Canova Moving & Storage Co.*, 261 NLRB 639 (Members Fanning, Jenkins, and Zimmerman).

> There are two basic classifications of Workmen's Compensation disability benefits: temporary and permanent. . . . ". . . . The primary element in temporary disability is the loss of wages . . . permanent bodily impairment is the prime consideration in determining right to permanent disability." . . . In other words, temporary disability payments are a substitute for lost wages . . . during the temporary disability period, while permanent disability is for permanent bodily impairment and is designed to indemnify for the insured employees' impairment of future earning capacity or "diminished ability to compete in the open labor market." [153]

In light of this, and as the entire aggregate amount paid to the discriminatee was in the form of a permanent disability indemnity, the panel found that it was clear that the sum thus paid was not a substitute for lost wages which might be offset against backpay due as a result of his unlawful discharge.[154]

3. Other Issues

In *Florida Steel Corp.,*[155] pursuant to a remand from the United States Court of Appeals for the District of Columbia,[156] the panel reexamined the extraordinary remedies granted in its previous supplemental decision and order herein.[157] In that earlier decision, the Board found that the employer had violated section 8(a)(5) and (1) of the Act by unilaterally changing the pay rates of two employees in the bargaining unit represented by the union at Indiantown, Florida, without first notifying and bargaining with the union about the issue. It had concluded that the usual cease-and-desist and affirmative remedial order would not adequately remedy the violations, because the employer's "pattern of unlawful conduct" in the preceding years had evidenced a "rejection of the principles of collective bargaining," of which its most recent violation was but a continuation.[158] Thus, the Board provided for the issuance of a corporatewide cease-and-desist order; corporatewide posting of the notice; the mailing and reading of the notice to all of the employer's employees; and the publication of the notice in all appropriate publications. In addition, it ordered the employer to permit the union access to any of its plants if, within 2 years of the order, a Board-conducted election was held at the plant, or if the employer gave a speech concerning union representation to employees convened for such a purpose. It deemed that these remedies were warranted because of the employer's pattern of attempting to defeat union representation at all costs by a sustained campaign of varied and repeated unfair labor practices at organized and unorganized plants alike.[159]

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[152] 46 Cal. App. 3d 405, Court of Appeals, 2d District, Div. 5, 120 Cal. Rptr. 627 (1975).

[153] *Id.* at 633-634.

[154] In addition, the panel, citing *American Manufacturing Company of Tex.*, 167 NLRB 520 (1967), found that, as the only temporary total disability payments made to the discriminatee were made outside the backpay period, those payments were likewise excluded as interim earnings.

[155] 262 NLRB 1460 (Members Fanning, Jenkins, and Zimmerman).

[156] *United Steelworkers of America* [*Florida Steel Corp.*] v. *N.L.R.B.*, 646 F.2d 616 (D.C. Cir. 1981).

[157] 244 NLRB 395 (1979).

[158] Citing *Id.* at 395; 242 NLRB 1333 at 1333–34.

Since the only propriety of the Board's remedial order was at issue before it, the court determined that the issue was one which required balancing the scope of the Board's remedial authority against an employer's right to deny a union access to its property and so considered whether the principles of *Babcock & Wilcox*[160] affected the Board's remedial grant of access to a union on a corporatewide basis at unorganized plants. It distinguished between access for organizational purposes and access as a remedy to deter employer interference with employee rights under the Act. In the former situation, the court held, private property rights need not be sacrificed as long as employee rights can be exercised through other means, while in the latter circumstances, the court stated that access may be imposed as a remedial measure without a finding that the union will be unable to reach the employee through other available channels of communication; thus, the critical inquiry is whether the employer's conduct is of such a nature that access is needed to offset harmful effects produced by that conduct. The Court also decided that union access may be awarded as a remedial measure at locations other than those where the employer engaged in its unlawful conduct, if such conduct produces a coercive effect or chills employee rights at those other plants. However, the court concluded that the Board's analysis had been insufficient to justify the remedial grant of access, stating that consideration must be given by the Board to factors such as the seriousness of the violations in issue; the extent to which employees in other plants know or have reason to know of unlawful conduct; the distance between the employer's operations; the presence or absence of union activity at various company locations; and in the case of a recidivist violator, the effect of the passage of time between violations. In short, the court held "that the Board must find that the employees at those plants where access is imposed have suffered coercive effects from the employer's unlawful conduct and that an access remedy is necessary to cure those effects."

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[159] *Florida Steel Corp.*, 242 NLRB at 1333-34, and cases cited therein. See also *United Steelworkers of America* v. *N.L.R.B.*, *supra*, 646 F.2d at 621-624, and cases cited therein at 621, fn. 9; *Florida Steel Corporation* v. *N.L.R.B.*, 648 F.2d 233 at 237 (5th Cir. 1981).

[160] *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

On remand, the Board panel considered the facts in the light of the court's standard of analysis and, after such analysis, adopted its previous order in all respects, except that it found that union access limited to the Tampa and Jacksonville facilities was appropriate. Thus, the panel did not reach the issue of whether corporatewide access would have been an appropriate remedy.

In considering the seriousness of the violations in issue, the first factor listed by the court, the panel found that the employer's failure to fulfill its statutory obligation to bargain with the union concerning changes in the rate of pay of two employees was not a *de minimis* violation. While noting that the violation would not, under ordinary circumstances, appear to justify extraordinary remedies, it stated that the violation had to be evaluated in the context of the employer's earlier conduct. The employer had reacted to the Indiantown employees' exercise of their section 7 rights in having the union certified in May 1974, by refusing to institute a new quarterly wage review policy or to grant wage increases to employees, and by also denying them an increase for call-in pay and an increase in the employer's tuition refund plan. These 8(a)(1) and (3) violations occurred in the last quarter of 1974. The employer then effected layoffs at the Indiantown plant in January 1975 and, in April 1975, committed the 8(a)(5) and (1) violation involved here a scant few months after the employer's first discriminatory conduct. Further, the employer refused to bargain at two other plants where the union was certified, and, at each of the four plants where the union conducted an organizational campaign, it withheld companywide benefits and widely publicized such withholding at the Indiantown plant in an attempt to discourage the Indiantown employees from selecting the union.

Accordingly, the Board panel found it clear that the Indiantown employees, over the course of a relatively short period of time, had been subjected to repeated and varied unfair labor practices, and that those practices were designed to discourage the employees from voting for the union, to penalize them for selecting the union, and then to undercut the union's status as exclusive representative. In these circumstances, it concluded that the violation here, although minor in scope, loomed much more serious than it would were it standing alone.

The Board panel then examined the court's second factor, i.e., the extent of knowledge at other facilities, and determined that evidence convinced it that the employees in other plants knew, or had reason to know, of the employer's unlawful conduct. Thus, it noted that the employer itself, on at least two occasions, publicized statutory violations committed at one plant as a warning to employees at another plant; the withholding of benefits at Charlotte was publicized at the Indiantown facility, and Tampa employees were warned about "gambling" with their wages and benefits and were urged to watch what happened at Indiantown and Charlotte, where the employer engaged in the unlawful conduct detailed above. The Board panel also adverted to additional evidence of employee knowledge of the employer's unlawful conduct which was detailed in the decision of the Court of Appeals for the Fifth Circuit in *Florida Steel Corp.* v. *N.L.R.B.*, 648 F.2d 233 (1981), where the court, in finding the employer in civil contempt, agreed with a special master's finding that two aspects of a videotape shown by the employer to employees violated the Act. The panel noted that the facts of the case revealed that the employer decided to produce and distribute to its plants a videotape of its antiunion campaign material to prevent employees from signing union authorization cards, and that it was to be shown to all current and new employees, except those represented by the union at Indiantown and Charlotte, and those at Tampa who had already viewed the antiunion material. The panel thus concluded that the employer, in its videotape presentation, by alluding to the situation at Indiantown, had driven home to almost every one of its employees its own previous unlawful conduct and had threatened to do more of the same. Further, the panel observed that the unlawful portions of the employer's videotape concerning wage and benefit practices were not excised until December 1978, while the segment on misuse of employee signatures remained in the tape. Thus, it drew clear the inference that the employer's contumacious conduct extended throughout 1978 and beyond, and since the employer's policy was nothing less than to show the film to all current employees and future hires, it concluded that the employer's own actions insured that employees throughout its system would focus on events at Indiantown. Accordingly, the Board panel found that it was reasonable to presume that knowledge of the unfair labor practices would be communicated to, or learned by, employees, and that the employer's own actions gave rise to the assumption that they had had a chilling effect on employees companywide.

The Board panel next considered the court's third factor of the distance between the employer's operations. It noted that the five Florida facilities were all within 300 miles of the Indiantown plant, and that the employer had five other facilities in other southeastern States. While recognizing that the Indiantown plant was a relatively isolated location in Florida, the panel disagreed with the employer's assertion that its employees located elsewhere were likely to be unaware of violations committed at Indiantown, because the above relevant history revealed that the employer had specifically directed its employees' attention to events at Indiantown.

Finally, the Board panel turned to the existence of union activity and the passage of time between violations, the court's last two factors. It noted that the employer claimed that there had been no significant union activity at unorganized plants since the 1976 election at its Tampa facility, and that therefore union access to employees at unorganized plants was unwarranted because the union had no special interest in the employees and because such access would have no additional remedial effect for a violation occurring in 1975 at Indiantown. The employer had also argued that since no charges of unfair labor practices had been sustained against it since 1976, this improved record, the remoteness of its past violations, and the existence of other Board remedies, indicated that any coercive or chilling effect on employees had been dissipated.

In opposition, the General Counsel had asserted that there was no passage of time between the violation at Indiantown and other of the employer's violations, and that the instant violation, which occurred in 1975, was committed during the employer's prime lawbreaking years—1974–1976. Both he and the union directed the Board's attention to the employer's contumacious behavior as found by the Fifth Circuit as a further indication of the employer's unlawful conduct during the period under consideration. In addition, the union contended that organizational activity at Tampa and Jacksonville was the special focus of the employer's concern, and that those employees had been subjected, *inter alia,* to coercive interrogations, surveillance, discharge, and the withholding of wages and benefits.

The Board panel agreed that these facts, coupled with those previously articulated, supported the need for union access to Tampa and Jacksonville to remedy the employer's unlawful conduct. It noted that it was mindful of the court's admonition that "history alone" could not justify corporatewide access unless it was reasonably foreseeable that "the employees at other locations [had] suffered coercive effects from the employer's conduct, and that an access remedy [was] necessary to cure those effects." The Board panel found that the lapse of time between when the violation here was committed and the current date was in large part a function of the legal process and that the employer had used this time to continue to disseminate by videotape its unlawful messages to virtually all of its employees. Furthermore, pointing out the unfair labor practices here came when the employer was committing various other unfair labor practices, the Board panel presumed that the unfair labor practice would have a greater impact than it otherwise might have had, and that its effect would linger beyond the time it normally would. In the panel's view, the employer's Tampa and Jacksonville employees could not help but be impressed with the employer's antiunion attitude and unlawful conduct and would surely remember this conduct if any union were to undertake an organizational campaign.

Moreover, the Board panel concluded that the mere passage of time did not inure to the employer's benefit. Recognizing that the employer was free to campaign against unionism, the panel found that the employer had committed itself to coercive means to reach that end. Further, the Board refused to infer that the recent lack of unfair labor practices committed by the employer indicated an "improved record" by this recidivist. Rather, it concluded that it was more than reasonable to find that, given the employer's pattern of unlawful behavior, the employees' full exercise of section 7 rights had been eviscerated so as to make the employer's unlawful conduct unnecessary over the last few years. The Board determined that "[t]his pattern teaches that if the Union were to begin anew organizational activity at any plant, the Company would respond as it has in the past,"[161] when it disregarded the orders of the court and Board. By describing the employer's past conduct, the panel stated that it was drawing inferences which it believed were reasonable in light of the employer's propensity to engage in unlawful conduct in order to assess properly the corporatewide effect of the employer's conduct and the need to remedy that conduct on a corporatewide basis.

In sum, the Board noted that the employer had continually sought to use its unlawful conduct at one plant to vitiate the rights of employees at another, that it had recently been found in contempt of court by committing unfair labor practices at almost all of its plants, and that the employer had concentrated antiunion efforts wherever and whenever the union had attempted to organize employees, including those at Tampa and Jacksonville. Since the harmful effects of such violations were plain, the panel concluded that certain companywide remedies were necessary to effectuate the policies of the Act, inlcuding corporatewide mailing, posting, and publication of the Board's notice, officials' reading of the notice to a gathering of its employees, and access by the union limited to the Tampa and Jacksonville facilities. The Board panel determined that the employees at these two facilities had borne the brunt of the employer's unfair labor practices, and that the access ordered here was not burdensome, requiring only that the employer relinquish some time and space to the union so that information might be imparted and employee apprehension of retaliation could be dissipated. The Board panel found that "such remedies, restore the parties to the *status quo ante,* and ensure that the rights of employees will be protected."[162]

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[161] 262 NLRB 1460 at 1465.

In *Sterling Sugars,*[163] the full Board modified the administrative law judge's recommended order by adding the affirmative requirement that the employer expunge from its records any reference to the unlawful discharge of the discriminatee. It also required the employer to provide the discriminatee with a written notice of the expunction and to inform him that its unlawful conduct would not be used as a basis for further personnel actions concerning him. The Board noted that, although such an expunction requirement had not typically been included in discharge cases heretofore, it frequently had been included in cases where warnings or other forms of discipline less than discharge had occurred. It saw no purpose in distinguishing between these two types of cases, for in either situation the individual affected by any unlawful discipline should be protected from the subsequent use of files pertaining to such misconduct. Accordingly, the Board decided that it would henceforth routinely include such an affirmative expunction remedy in all cases of unlawful discipline.

K. Equal Access to Justice Act Issues

The Equal Access to Justice Act, 5 U.S.C. § 504 (EAJA), and the Board Rules promulgated thereunder,[164] permit eligible parties that prevail in litigation before the Agency and over the Agency in Federal court, in certain circumstances, to recover litigation fees and expenses from the Agency. Section 504(a)(1) provides that "an agency that conducts an adversary adjudication is required to award to a prevailing party fees and other expenses incurred by the party . . . unless the adjudicative officer of the agency finds that the position of the agency . . . was substantially justified or that special circumstances make an award unjust." Section 504(a)(2) provides that within 30 days of a final disposition of the case, a party seeking an award must file with the agency an application which shows that the party prevailed below and is eligible under the Act to receive the award,[165] itemizes the amount sought, and alleges that the position of the agency was not substantially justified. Acting upon the application, the adjudicative officer of the agency, under section 504(a)(3), may reduce the amount to be awarded, or deny an award, where the party during the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. Section 504(b)(1)(A) requires the award of fees and expenses to be "based upon prevailing market rates for the kind and quality of the services furnished," except that an "expert witness shall not be compensated at a rate in excess of the highest rate for expert witnesses paid by the agency," and "attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceeding involved, justifies a higher fee."

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[162] *Id.* at 1465.

[163] 261 NLRB 472 (Chairman Van de Water and Members Fanning, Jenkins, Zimmerman, and Hunter).

[164] Board Rules and Regulations, secs. 102.143 through 102.155.

In *Monark Boat Co.*,[166] the issue was whether consideration of a respondent's application pursuant to the EAJA,[167] for an award of attorney's fees and expenses, filed on the 31st day after the entry of the Board's final order in the underlying unfair labor practice case, was barred for jurisdictional reasons. The panel adopted the administrative law judge's recommendation that the application be dismissed because it was untimely filed.

The facts revealed that on September 4, 1981, the administrative law judge issued a decision recommending the dismissal of the complaint in the unfair labor practice case. No party filed exceptions to his decision. On October 6, in accord with section 102.48(a) of the Board's Rules and Regulations, the Board automatically entered its final order adopting the administrative law judge's decision. On November 5, the respondent mailed the application for an award of attorney's fees and expenses, which was received by the Board on November 6, 31 days after the entry of the Board's final order.

The Board pointed out that EAJA, section 504(a)(2), provides that a party seeking attorney's fees and other costs "shall, within thirty days of a final disposition in the adversary adjudication, submit . . . an application" to the Board. Because the statute relinquished the Government's immunity from suit, the panel concluded that it must be construed strictly. Noting that the statute uses the mandatory "shall" and makes no provision for exceptions or agency discretion, and that the legislative history of EAJA confirms that Congress intentionally drafted the 30-day period as a mandatory condition, the panel found that it was compelled to conclude that the 30-day period was a jurisdictional prerequisite which the Board could not legally extend.

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[165] 5 U.S.C. § 504(b)(1)(B) defines "party" to exclude individuals and certain enterprises from the coverage of the Act.

[166] 262 NLRB 994 (Chairman Van de Water and Members Jenkins and Hunter).

[167] 5 U.S.C.A. § 504 (1982).

The panel also rejected respondent's argument that the administrative law judge erred in not extending the filing period 3 days pursuant to section 102.114(a) of the Board's Rules, finding that extending the period in which such applications could be filed would be an impermissible exercise of the Board's rulemaking authorization. It further found that, in any event, section 102.114(a) was inapplicable since EAJA requires submission of application within 30 days of final judgment and makes no mention of service, while section 102.114(a) is triggered only when a party's action must take place within a certain period "after service." Thus, since it is the entry of the Board's final order that marks the beginning of the filing period, rather than service of notice of final judgment, section 102.114(a) is immaterial.

Consequently, the panel held that where an application fails to comply with the specified jurisdictional time period, it was without jurisdiction to pass upon the merits of the application. Accordingly, it dismissed respondent's application for lack of jurisdiction.

In *Intl. Maintenance Systems Group,*[168] and *Allied Lettercraft Co.,*[169] the petitioners filed, pursuant to sections 102.124 and 102.146 of the Board's Rules, motions seeking to amend section 102.145 of the Board's Rules to provide for an increase in the fees, recoverable under EAJA, payble to "agents and attorneys" from $75 to $140 per hour. They alleged, in pertinent part, that $140 per hour was a reasonable fee for an attorney with the experience and expertise of its attorneys. They also maintained that there were no qualified attorneys regularly practicing in the city of New York, the site of their operations, with sufficient expertise to defend the unfair labor practice allegations brought by the General Counsel of the Board, who charges fees of $75, and claimed that the reasonable rate for attorneys with the experience and expertise of its attorneys ranged from $100 to $200 per hour.

The Board carefully considered petitioners' motions and decided that they should be denied. The Board noted that section 504(b)(1)(A) provides that "attorney or agent fees shall not be awarded in excess of $75 per hour, unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee." Enacted on October 21, 1980, the Act became effective on October 1, 1981, the same date as the Board's Rules herein. Since, as evidenced by the motions that the reasonable attorney or agent fee in certain circumstances exceeded $75 prior to the passage of the Act, the Board concluded that Congress must have been aware of such circumstances when it decided to set the fee at $75 per hour. Accordingly, and as there appeared to be no change in circumstances since the passage of the Act which warranted higher fees, the Board decided to deny the petitioners' motions for rulemaking proceedings to increase attorney and agents fees.

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[168] 262 NLRB 1 (Chairman Van de Water, and Members Fanning, Jenkins, Zimmerman, and Hunter).

[169] 262 NLRB 2 (Chairman Van de Water, and Members Fanning, Jenkins, Zimmerman, and Hunter).

In *Columbia Mfg. Co.,*[170] the petitioner filed a petition to increase fees payable, under the EAJA and section 102.145 of the Board's Rules, to agents and attorneys from $75 per hour to $145 per hour. The petition alleged, in pertinent part, that the $75 per hour statutory fee should be increased to a maximum of $145 per hour to permit the petitioner to recover the actual fees charged by its attorneys. The petitioner contended that the fees of its attorneys were reasonable considering the prevailing rate for similar services in the community in which the attorneys ordinarily performed services. As special factors warranting an increase in the statutory fee, the petitioner cited the conduct of the General Counsel and the union in allegedly, knowingly presenting perjured testimony and fraudulent evidence against the petitioner in the unfair labor practice proceeding before the Board.

The Board determined that neither EAJA nor the applicable Board Rules, which permit eligible parties that prevail in litigation before the Agency or over the Agency in Federal court, in certain circumstances, to recover litigation fees, indicated that the prevailing rate or alleged improper agency action might constitute justification for increasing agent and attorney fees. Accordingly, and as there apeared to be no change in circumstances since the Act and applicable Board Rules became effective, the Board found rulemaking to increase the agent and attorney fees was unwarranted and therefore denied the petition to engage in rulemaking for that purpose.

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[170] 262 NLRB 3 (Chairman Van de Water and Members Fanning, Jenkins, Zimmerman, and Hunter).

VI

Supreme Court Litigation

During the fiscal year 1982, the Supreme Court decided three cases in which the Board was a party and two cases in which the Board participated as *amicus curiae.* The Board's position prevailed in the three cases in which the Board was a party and in one of the cases in which the Board participated as *amicus.*

A. Definition of Term "Confidential Employee"

In *N.L.R.B.* v. *Hendricks County Rural Electric Membership Corp.,*[1] the Court, by a 5-to-4 vote,[2] upheld the Board's "labor-nexus" test for determining "confidential employee" status. Rejecting the claim that all employees with access to confidential business information are excluded from the coverage of the Act, the Court approved the Board's practice of excluding from bargaining units only employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. Noting that its ultimate task was to determine whether the Board's policy has "a reasonable basis in law," the Court concluded that:

> Clearly the NLRB's longstanding practice of excluding from bargaining units only those confidential employees satisfying the Board's labor-nexus test, rooted firmly in the Board's understanding of the nature of the collective bargaining process, and Congress' acceptance of that practice, fairly demonstrates that the Board's treatment of confidential employees does indeed have "a reasonable basis in law." [Sl. op., p. 20.]

Applying the "labor-nexus" test, the Court agreed with the Board that the secretary to Hendricks' chief executive officer was not a confidential employee because she had no access to confidential labor-relations matters, and therefore her discharge for engaging in protected activity violated section 8(a)(1) of the Act. The Court also agreed with the Board that 18 employees in the companion *Malleable* case (fn. 1, *supra*) were not excludable from a bargaining unit because they had access to nonlabor-related confidential information.

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[1] 92 LC ¶13,098, reversing and remanding 627 F.2d 766 and 631 F.2d 734 (7th Cir. 1980), reversing 247 NLRB 498 (1979) and 244 NLRB 485 (1979). The Court's opinion also covered a companion case *N.L.R.B.* v. ***Malleable Iron Range Co.***

[2] Justice Brennan wrote the opinion of the Court; Justice Powell, joined by Chief Justice Burger and Justices Rehnquist and O'Connor, filed an opinion concurring in part and dissenting in part.

The dissenting justices agreed with the majority that the employees involved in *Malleable* should not be deemed confidential employees because of their access to "proprietary or nonpublic business information." However, they disagreed that the secretary in *Hendricks* was not a confidential employee, asserting that confidential secretaries are allied with management regardless of "labor-nexus" by virtue of their position of trust and close relationship with the management officials for whom they work.

B. Bargaining Impasse Not Unusual Circumstance Justifying Withdrawal From a Multiemployer Bargaining Unit

By another 5-to-4 vote, the Court, in *Bonanno Linen,*[3] upheld the Board's position that a bargaining impasse does not justify an employer's unilateral withdrawal from a multiemployer bargaining unit. In that case, after negotiations for a new contract between the union and the multiemployer association, of which Bonanno was a member, reached an impasse, the union struck Bonanno, and most of the other association members responded by a lockout. After hiring permanent replacements for its striking employees, Bonanno then withdrew from the association. The Board, affirmed by the court of appeals, held that impasse was not an "unusual circumstance," under the *Retail Associates,* 120 NLRB 388 (1958), guidelines, which would justify untimely withdrawal from a multiemployer unit. It ordered Bonanno to sign and implement retroactively the contract ultimately executed by the union and the association.

The Supreme Court, observing that "assessing the significance of impasse and the dynamics of collective bargaining is precisely the kind of judgment that . . . should be left to the Board," concluded that the Board's resolution of the issue was not "arbitrary or contrary to law" (sl. op., p. 9). The Court noted that the Board had explained that "impasse is only a temporary deadline or hiatus in the negotiations 'which in almost all cases is eventually broken either through a change of mind or the application of economic force,'" and that an impasse may be "brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process" (sl. op., p. 8). In the Court's view, these reasons warranted the Board in concluding that "permitting withdrawal at impasse would as a practical matter undermine the utility of multiemployer bargaining" (*ibid.*).

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[3] *Charles D. Bonanno Linen Service* v. *N.L.R.B.,* 102 S. Ct. 720, affg. 630 F.2d 25 (1st Cir. 1980), enfg. 243 NLRB 1093 (1979).

Justice White delivered the opinion of the Court. Chief Justice Burger, joined by Justice Rehnquist, filed a dissenting opinion; Justice O'Connor, joined by Justice Powell, also filed a dissenting opinion.

The Court went on to consider the propriety of the Board's position that interim agreements entered into by some members of a multiemployer unit and the union during a bargaining impasse also would not justify withdrawal from a multiemployer unit. Noting that the Board distinguishes "between interim agreements which contemplate adherence to a final unitwide contract and are thus not antithetical to group bargaining and individual agreements which are clearly inconsistent with, and destructive of, group bargaining" (sl. op., p. 10), the Court held that the Board had acted "within the zone of discretion entrusted to it by Congress" in concluding

> * * * that interim agreements, on balance, tend to deter rather than promote unit fragmentation since they preserve a continuing mutual interest by all employer members in a final association-wide contract. [Sl. op., p. 12.]

C. Scope of the Construction Industry Proviso to Section 8(e) of the Act

In *Woelke & Romero,*[4] the Court[5] unanimously upheld the Board's position that the construction industry proviso to section 8(e) privileges union signatory subcontracting clauses[6] that are negotiated in the context of a collective-bargaining relationship even though they are not limited in application to jobsites at which both union and nonunion workers are employed.

The Court noted that, read literally, the construction industry proviso to section 8(e) "would seem to shelter [such] subcontracting agreements" (sl. op., p. 7).[7] The Court found that the legislative history of section 8(e) "confirmed this view." It shows that Congress intended the proviso to maintain the pattern of collective-bargaining in the construction industry, and that it "believed that broad subcontracting clauses similar to those at issue here were part of the pattern of collective-bargaining prior to 1959, and that the Board and the Courts had found them to be lawful" (sl. op., p. 15).

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[4] *Woelke & Romero Framing* v. *N.L.R.B.*, 102 S. Ct. 965, affg. in part, vacating in part, and remanding 654 F.2d 1201 (9th Cir. 1981), eng. 239 NLRB 241 (1978).

[5] Justice Marshall delivered the opinion of the Court.

[6] Such clauses bar subcontracting of jobsite work except to subcontractors who are signatories to agreements with particular unions.

[7] Sec. 8(e) proscribes agreements requiring an employer to cease doing business with another party; the proviso exempts from that proscription agreements between a union and an employer in the construction industry concerning subcontracting of work to be done at a construction jobsite.

The Court thus rejected the contention that Congress intended the priviso to deal exclusively with the problem of jobsite friction caused by union and nonunion employees working side by side.[8] The Court also rejected the contention that, privileging union signatory subcontracting clauses without limitation, would encourage top-down organizing tactics. "Congress endorsed subcontracting agreements obtained in the context of a collective-bargaining relationship—and decided to accept whatever top-down pressure such clauses might entail. Congress concluded that the community of interests on the construction jobsite justified the top-down organizational consequences that might attend the protection of legitimate collective-bargaining objectives" (sl. op., p. 18).[9]

D. Coverage Under the Act of Political Boycotts

In *Allied Intl.,*[10] the longshoremen's union, in protest of the Russian invasion of Afghanistan, refused to unload from ships docking in Boston wood products which Allied had imported from Russia. Allied brought an action in Federal district court for damages under section 303 of the Labor Management Relations Act, claiming that the union's refusal to unload its shipments constituted an illegal secondary boycott under section 8(b)(4)(B) of the National Labor Relations Act.[11] The district court dismissed the complaint, holding that the boycott was a political dispute and was not within the scope of section 8(b)(4). The court of appeals reversed.

The Supreme Court, in a unanimous opinion,[12] affirmed the court of appeals. Upholding the position advocated by the Board, as *amicus curiae,*[13] that the union's "activity here was 'in commerce' and within the scope of the NLRA," the Court pointed out that the "boycott here did not aim at altering the terms of employment of foreign crews on foreign-flag vessels"; thus the "longstanding tradition of restraint in applying the laws of this country to ships of a foreign country [14] . . . is irrelevant to this case" (sl. op., p. 8). The Court also held that the political nature of the union's dispute did not exempt its boycott activity from the reach of section 8(b)(4). The Court explained:

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[8] See *N.L.R.B.* v. *Denver Bldg. & Constr. Trades Council,* 341 U.S. 675 (1971).

[9] The Court did not reach the issue of whether the union's picketing of Woelke to secure the subcontracting clause violated Sec. 8(b)(4)(A) of the Act, concluding that consideration thereof was barred by sec. 10(e) of the Act which precludes judicial review of issues not raised before the Board.

[10] *Intl. Longshoremen's Assn., AFL-CIO* v. *Allied Intl.,* 102 S. Ct. 1656, affg. 640 F.2d 1368 (1st Cir. 1981).

[11] Sec. 8(b)(4)(B) prohibits a labor union from inducing individuals employed by "any person engaged in commerce or in an industry affecting commerce" to refuse to handle goods with an object of forcing any person "to cease using, selling, handling, transporting, or otherwise dealing" in the products of, or "to cease doing business" with, another person.

[12] Justice Powell wrote the opinion of the Court.

[13] See also *Intl. Longshoremen's Assn., AFL-CIO (Allied Intl.),* 257 NLRB 1075 (1981).

[14] See, e.g., *Benz.* v. *Comdania Naviera Hidalgo,* 353 U.S. 138 (1957).

> We would create a large and undefinable exception to the statute if we accepted the argument that "political" boycotts are exempt from the secondary boycott provision. The distinction between labor and political objectives would be difficult to draw in many cases. In the absence of any limiting language in the statute or legislative history, we find no reason to conclude that Congress intended such a potentially expansive exception to a statutory provision purposefully drafted in broadest terms. [Sl. op., pp. 12-13.]

E. Availability of Defense of Illegality Under Section 8(e) in Suit to Enforce Provision of Bargaining Agreement Requiring Contributions to Union Welfare Funds

In *Kaiser Steel,*[15] the Court[16] held, that a coal producer, who was sued by trustees of union health and retirement funds for contributions owed based on purchases from nonunion producers, could raise the defense that the clause in the collective agreement mandating the contributions was illegal under the antitrust laws and section 8(e) of the Act.

The Court noted that, while, as a general rule, Federal courts do not have jurisdiction over activity that is arguably subject to section 8 of the NLRA, a Federal court has a duty to determine whether a contract clause violates Federal law before enforcing it. Section 8(e) renders hot cargo clauses void at their inception and at all times unenforceable by the courts. Thus, the Court concluded, where an 8(e) defense is raised by a party which section 8(e) was designed to protect, and where the defense is not directed to a collateral matter but to a portion of the contract for which enforcement is sought, a court must entertain the defense.

The Court rejected the contention, asserted by the government as *amicus curiae*, that section 306(a) of the Multiemployer Pension Plan Amendments Act of 1980 indicated a congressional intent to preclude the availability of illegality defenses in actions for delinquent contributions brought by pension fund trustees. The Court stated that, "[f]ar from abolishing illegality defenses, Section 306(a) explicity requires employers to contribute to pension funds only where doing so would not be 'inconsistent' with law" (sl. op., p. 15). The Court added that the sponsors of the Act did not suggest "that employers should be prevented from raising all defenses; rather they spoke in terms of 'unrelated' and 'extraneous' defenses." Here, the defense was "based on the illegality of the very promise sought to be enforced." (*Ibid.*)[17]

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[15] *Kaiser Steel Corp.* v. *Julius Mullins,* 92 LC ¶13,128, reversing and remanding 642 F.2d 1302 (D.C. Cir. 1981).

[16] Justice White wrote the opinion of the Court; Justice Brennan, joined by Justices Marshall and Blackmun, dissented.

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[17] The dissenting justices believed that sec. 306(a) was intended to allow an illegality defense "*only* when the payment at issue is *inherently* illegal. For example, when the payment is in the nature of a bribe" (dissent, sl. op., p. 4).

VII

Enforcement Litigation

A. Equal Access to Justice Act

On October 1, 1981, the Equal Access to Justice Act[1] became effective. It provides, among other things, that in certain civil actions brought by or against the United States or an agency thereof in Federal court, attorneys' fees are to be awarded to a prevailing party—other than the United States—unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.[2] In one case,[3] the Sixth Circuit, which had denied enforcement of a Board bargaining order on the ground that the Board's unit determination was contrary to prior Sixth Circuit precedent,[4] nevertheless held that the Board had been substantially justified in seeking enforcement of its order and therefore denied the employer's application for attorneys' fees. The court noted that the legislative history of the Equal Access to Justice Act shows that the mere fact that the Board was the losing party did not show that its position was not substantially justified; the requirement of substantial justification would be satisfied if the Government showed that its action had a reasonable basis both in law and in fact. In this case, the court held, the Board had reasonably relied on Supreme Court and Sixth Circuit decisions according it broad discretion in the choice of appropriate bargaining units,[5] on Sixth Circuit decisions upholding the Board's presumption that a single-location unit is appropriate,[6] and on decisions of other circuits upholding the specific determination made in the instant case—that a single branch of a bank was an appropriate bargaining unit.[7] In addition, two judges of the Sixth Circuit had indicated support for the Board's position.[8] Accordingly, the court concluded that the Board's position was a reasonable attempt to resolve a close question.

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[1] 28 U.S.C. §2412.

[2] 28 U.S.C. §2414(d)(1)(A).

[3] *Wyandotte Savings Bank* v. *N.L.R.B.*, 682 F.2d 119 (6th Cir.).

[4] *Wyandotte Savings Bank* v. *N.L.R.B.*, 669 F.2d 386 (6th Cir.), citing *Wayne Oakland Bank* v. *N.L.R.B.*, 462 F.2d 666 (6th Cir. 1972).

[5] *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485 (1947); *N.L.R.B.* v. *Winn-Dixie Stores, Inc.*, 341 F.2d 750 (6th Cir. 1965), cert. denied 382 U.S. 830.

[6] *N.L.R.B.* v. *Forest City Enterprises*, 663 F.2d 34 (6th Cir. 1981); *Meijer* v. *N.L.R.B.*, 564 F.2d 737 (6th Cir. 1977).

[7] *Alaska Statebank* v. *N.L.R.B.*, 653 F.2d 1285 (9th Cir. 1981); *Banco Credito y Ahorro Ponceno* v. *N.L.R.B.*, 390 F.2d 110 (1st Cir. 1968), cert. denied 393 U.S. 832.

Only a "prevailing party" is entitled to an award of attorneys' fees under the Equal Access to Justice Act. In one case [9] where the Board's order had been denied enforcement because of prejudicial error at the hearing before the administrative law judge, and the case had been remanded for a further hearing,[10] the Ninth Circuit held that the employer was not a "prevailing party" and was therefore not entitled to an award of attorneys' fees. The court noted that the legislative history of the Equal Access to Justice Act indicated that the term "prevailing party" was to be defined in accordance with case law under existing statutes authorizing awards of attorneys' fees, and that the Supreme Court, in *Hanrahan* v. *Hampton,*[11] a case arising under the Civil Rights Attorneys' Fees Act of 1976,[12] had held that the term included only a party who prevailed, in whole or in part, on the merits of the case and not one who prevailed only on a procedural or evidentiary ruling. Since the Equal Access to Justice Act could not be distinguished from the statute involved in *Hanrahan* v. *Hampton* on the issue in point, the court denied the employer's application for attorneys' fees.

B. Board Procedure

In *Giacalone,*[13] the Third Circuit agreed with the Board that an alleged discriminatee who did not personally seek to file unfair labor practice charges or to intervene may not file exceptions to the administrative law judge's decision. In this case the union had filed charges alleging that Giacalone and others were discriminatorily discharged. The administrative law judge recommended that the complaint be dismissed and the Union filed no exceptions. Shortly before the time expired for filing exceptions, Giacalone sent a telegram to the Board stating "that I would like to file an appeal from the Decision of Judge Green as pertains to me." The Board dismissed the complaint, noting that Giacalone was not entitled to file exceptions because he had not sought to file a charge or intervene.

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[8] Circuit Judge Edwards, dissenting in *Wayne Oakland Bank, supra,* fn. 4, was of the view that the Board's unit determination there was within its broad discretion. Circuit Judge Merritt, concurring in the enforcement proceeding in the instant case (*Wyandotte Savings Bank* v. *N.L.R.B., supra,* fn. 4), expressed agreement with Judge Edwards' views.

[9] *N.L.R.B.* v. *Doral Bldg. Services,* 680 F.2d 647 (9th Cir.).

[10] *N.L.R.B.* v. *Doral Bldg. Services,* 666 F.2d 432 (9th Cir.).

[11] 446 U.S. 754 (1980).

[12] 42 U.S.C. § 1988.

[13] *Leonard Giacalone* v. *N.L.R.B.,* 682 F.2d 427.

As a "person aggrieved" by a final order of the Board,[14] an alleged discriminatee may file a petition to review a Board order denying relief. The Act also provides, however, that no "objection which has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Giacalone argued that, since the right to petition for review is meaningless unless a basis for review is preserved by filing exceptions, the Act must contemplate the filing of exceptions by those who, although not parties to the Board proceedings, nonetheless would be aggrieved by dismissal of the complaint. The court observed that, while "it is not inconceivable that Congress intended that discriminatees be permitted to file exceptions, it would seem odd, if that were intended, to fix a time period [for filing exceptions] in terms of service upon the parties, rather than upon affected nonparties." The court also gave deference to the view of the Board as the agency charged with administering the Act, that the need for certainty and finality justifies this limitation.

C. Jurisdiction and Venue

The Sixth Circuit upheld the Board's assertion of jurisdiction over visually handicapped workers in the Association's sheltered workshop for the blind.[15] The court rejected the Association's contention that Congress intended that such workers should be excluded from the definition of "employees." After noting the absence of any express statutory exclusion or relevant legislative history with respect to the Labor Act, the court turned to the contention that in other legislation Congress recognized and approved the "rehabilitative" and "therapeutic" function of sheltered workshops. While the court recognized that Congress had indeed sought to benefit the handicapped through legislation favoring sheltered workshops, the court rejected the premise that Congress regarded collective bargaining as incompatible with any kind of therapy. The court also noted that in asserting jurisdiction the Board looks to see whether the guiding principle of the workshop is primarily "rehabilitative" or typically industrial. In the instant case, for example, the Board relied on evidence that the workers did not generally go on to other jobs, that the workshop produced commercial goods—including half the adding machine tape used by the Federal government—and made a substantial profit which the Association used to defray unrelated expenses. Accordingly, the court refused to find that the Board had abused its discretion, either by formulating its jurisdictional test or by applying it here.

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[14] Sec. 10(f) of the Act.

[15] *Cincinnati Assn. for the Blind* v. *N.L.R.B.*, 672 F.2d 567.

In another case,[16] the First Circuit determined that the employers did not "reside or transact business"[17] within that circuit and hence could not file a petition to review the Board's order there. The employers had their principal places of business in Connecticut and in New Jersey, respectively, and hence the Second and Third Circuits had venue. In asserting that venue also lay in the First Circuit, the employers alleged that they had bought from and sold to businesses within that circuit and that one customer in Massachusetts acted as "exclusive sales representative" for one of the employers. The court noted that the two cases most nearly in point [18] involved some sort of physical presence within the circuit—a warehouse or an office—on which to base venue. Without deciding whether such a minimal physical presence was sufficient, the court held the lack of such a presence—particularly the absence of any employees within the circuit—was determinative.

D. Unfair Labor Practices

1. Employer Interference with Employee Rights

a. The *Interboro* Doctrine

The Sixth Circuit was presented with two cases involving application of the *Interboro*[19] rule to an employee's complaint concerning safety matters. In *Roadway Express,*[20] the Board, citing *Interboro,* explained that an employee is engaged in concerted activity protected under section 8(a)(1) of the Act when he makes a complaint concerning safety matters which are embodied in a collective-bargaining agreement, because he is acting not only in his own interest, but also is attempting to enforce such contract rights in the interest of all employees covered by that contract. In one case,[21] where the contract gave employees the right to refuse to operate unsafe equipment, an employee was discharged for refusing to drive a truck he knew had brake problems. The court, disagreeing with the Board, held that the employee's actions were not concerted within the meaning of section 7 of the Act because there was no evidence that he acted or asserted an interest on behalf of anyone other than himself. The court noted that the employee did not attempt to warn other employees not to drive the truck he believed to be unsafe, that he did not go to his union representative in an effort to avoid driving the truck, and that his union made no effort to protest the use of the truck and limited itself to processing, through initial stages, the employee's grievance over his discharge.

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[16] *S. L. Industries and Extruded Products Corp.* v. *N.L.R.B.*, 673. F.2d 1.

[17] National Labor Relations Act, sec. 10(e).

[18] *Farah Mfg. Co.* v. *N.L.R.B.*, 481 F.2d 1143 (8th Cir. 1973), and *Olin Industries* v. *N.L.R.B.*, 191 F.2d 613, 614, fn. 1 (5th Cir. 1951), cert. denied 343 U.S. 919 (1952).

[19] *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

[20] 217 NLRB 278 (1975), enfd. mem. decision 532 F.2d 751 (4th Cir. 1976), previously remanded to the Board *sub nom. Banyard* v. *N.L.R.B.*, 505 F.2d 342 (D.C. Cir. 1974).

[21] *City Disposal Systems* v. *N.L.R.B.*, 683 F.2d 1005.

In the other case [22] a divided court affirmed the Board's findings that the employer violated section 8(a)(1) by discharging two employees on successive days because each refused to drive the same truck that had a steering defect. The court, explaining that in its view there is a distinction under the Act between the activity of an individual operating in his own interests and the activity of the individual acting alone, but advancing the interests of the group, held that each employee was engaged in concerted activity because he acted pursuant to directions from his union. The court noted that the first employee contacted a union official for directions on how to proceed when he discovered the steering defect and subsequently sought to involve union members and inform them of the dispute and that the second employee was advised by union officials as to the safety problem and informed that he did not have to drive the truck until the employer provided documentation required by the contract that the truck had been repaired and was safe to operate.

b. Civil Suits Against Employees

In *Bill Johnson's Restaurants* v. *N.L.R.B.*,[23] the Ninth Circuit affirmed the Board's decision that an employer who files a state civil suit against employees in bad faith for the purpose of retaliating against them for their exercise of rights under the Act commits an unfair labor practice and can be ordered to withdraw the suit. The case arose when a waitress who believed she had been discharged for union activity filed charges with the Board and, with a handful of supporters, then picketed the restaurant asking the public to boycott it. The pickets also distributed a handbill which stated that a complaint had been issued against the restaurant for unfair labor practices, and listed working conditions which the waitresses found unsatisfactory.

On the first day of the picketing, a member of management confronted the pickets and took down their names, stating, "You're going to all pay for this," and "I'll get even with you if it's the last thing I do." That evening, the restaurant's president telephoned a picket at home and made veiled threats of economic reprisals. The restaurant filed a complaint, 5 days later, in state court against the pickets alleging that they had engaged in mass picketing and harassment, blocked entrance to the restaurant, created a threat to public safety, and distributed a leaflet which libeled the restaurant and its management. The complaint sought injunctive relief, actual damages, and $500,000 in punitive damages. The restaurant's attorneys then immediately deposed the pickets and asked them numerous questions directed at discovering the extent of union organization at the restaurant and the evidence they had to support the unfair labor practice charges then pending before the Board.

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[22] *McLean Trucking Co.* v. *N.L.R.B.*, 689 F.2d 605.

[23] 660 F.2d 1335, cert. granted October 18, 1982 (No. 91-2257).

The court upheld the Board's order requiring the restaurant to withdraw its civil suit and to reimburse the pickets for all legal expenses incurred in defending it.[24] The court noted that the Board has been reluctant to limit the right to bring suit in state court,[25] and emphasized that, under the Board's rule, an employer who brings a good-faith action for violations of state law, and who produces evidence showing that his claim is a colorable one, will not be guilty of an unfair labor practice. In this case, however, the court found the restaurant's allegations of mass picketing, violence, and trespass to be "totally unsubstantiated," and noted that the restaurant had produced no evidence whatsoever to support its libel claim. The court held that the lack of a reasonable basis for the suit tended to support the Board's conclusion that the suit had been filed to retaliate against the employees' protected protest picketing and filing of charges. In addition, the court found management's threats to the pickets, and its use of the deposition process to chill employees' protected activities and to circumvent the Board's narrow discovery rules, to be evidence supporting the conclusion that the suit was prompted by an improper purpose. The court rejected the restaurant's argument that the suit had a reasonable basis because the complaint on its face stated a claim cognizable by the state court, explaining, "more than a carefully drawn complaint is required to avoid a finding that a lawsuit lacks a reasonable basis." [26] In sum, the court upheld the Board's conclusion that the restaurant's lawsuit violated section 8(a)(4) and (1) of the Act, and affirmed the Board's power, in these circumstances, to order withdrawal of the suit.

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[24] The Board's order, which the court enforced in full, also required reinstatement of the discharged waitress with backpay; reinstatement, with backpay, of three others who had gone on strike in her support; and the posting of notices.

[25] See *Clyde Taylor Co.*, 127 NLRB 103 (1960).

[26] 660 F.2d at 1343.

c. Discharge of Supervisor

In *Hi-Craft Clothing Co.,*[27] following its decision in *General Services,*[28] the Board found that the Company's discharge of a conceded supervisor for stating his intention to seek the Board's assistance in his bonus dispute with management violated section 8(a)(4) of the Act because it contravened the policy of according all persons free access to the Board's procedures. Although section 2(3)'s exclusion of supervisors from the Act's protections would have prevented the Board from remedying the supervisor's underlying claim, the Board reasoned that every person's right to file a charge must be protected to give the Board the opportunity to determine the person's supervisory or employee status. The Third Circuit disagreed.[29] The court noted that the supervisor's discharge did not implicate the rights of rank-and-file employees and that Congress "was in earnest in excluding" supervisors from protection in their own right. The court concluded that "[d]evoid of power to adjudicate the merits of the underlying grievance because of the supervisor's status," the Board "may not assert a power to protect its process." Once his supervisory status was conceded, the court held, the Board was required to dismiss the charge.

d. *Weingarten* Rights

Since the Supreme Court's *Weingarten* decision,[30] it is settled that employees have the right to have a union representative present at investigatory interviews with their employer if they request such representation and reasonably believe that disciplinary action may result. In two cases the critical question was the role a representative might properly assume at a *Weingarten* interview. In *Texaco,*[31] the employer allowed the employee under investigation to bring a union official to the meeting, but advised the official that he would not be permitted to say anything during the interview. During the interview, the employee admitted violating a plant rule, and received a reprimand. The court in agreement with that Board, found that the employer's conduct unlawfully impaired the employee's *Weingarten* right. The court noted the Supreme Court's observation that a *Weingarten* representative "may attempt to clarify the facts or suggest other employees who may have knowledge of them" but that the employer was free "to insist that [he] was only interested, at that time, in hearing the employee's own account of the matter under investigation." Construing this language, and other language in *Weingarten* which recognized that the representative should be able to take an active role in assisting the interviewee, the court ruled that the employer violated section 8(a)(1) by barring the representative from any form of participation.

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[27] 251 NLRB 1310 (1980).

[28] 229 NLRB 940 (1977), enforcement denied 575 F.2d 298 (5th Cir. 1978).

[29] *Hi-Craft Clothing Co.* v. *N.L.R.B.*, 660 F.2d 910.

[30] *N.L.R.B.* v. *Weingarten,* 420 U.S. 251 (1975).

[31] *N.L.R.B.* v. *Texaco,* 659 F.2d 124 (9th Cir.).

In the second case,[32] the employee requested—and was granted—the presence of a representative after a supervisor had apprised the employee of evidence linking the employee to the theft of company equipment. When the representative appeared at the meeting, the supervisor asked him not to answer any of the questions the supervisor was about to ask the employee. After those questions elicited a confession, the supervisor asked the representative if he had any questions or clarifications; the representative had nothing to add. In rejecting the Board's finding of unlawful interference, the court relied on the same language from *Weingarten* cited by the Ninth Circuit in *Texaco.* Inasmuch as the employer had allowed the employee to consult with the representative *before* the meeting, had told the representative that he would be free to make additions, suggestions, or clarifications when the supervisor had completed his questioning, and in fact gave the representative the opportunity to do so, the court concluded that the limitation imposed on the representative fell within the Supreme Court's guidelines.

In a third *Weingarten* case,[33] an interview conducted without the requested representative led to a confession of misconduct, and the employee was discharged. The court agreed with the Board that, at least under these circumstances, the employer could not lawfully reject the employee's request for the assistance of a *former* union officer and still insist upon the interview. The court emphasized that the requested representative had some labor relations expertise by virtue of her former position, that no current union official was available on that shift, and that the parties' collective-bargaining agreement did not waive the employees' right to request a representative other than a union official. However, the court remanded the Board's order insofar as it directed the discharged employee's reinstatement with backpay. Pointing to section 10(c) of the Act,[34] the court ruled that the employer had not been given a sufficient opportunity to show that the discharge decision did not stem entirely from the "coerced" confession but was substantially supported by other independent evidence which was available to the employer prior to the discharge.

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[32] *Southwestern Bell Telephone Co.* v. *N.L.R.B.*, 667 F.2d 470 (5th Cir.).

[33] *N.L.R.B.* v. *Ill. Bell Telephone Co.*, 674 F.2d 618 (7th Cir.).

[34] That section bars a reinstatement order for any individual "who was suspended or discharged for cause."

Another *Weingarten* case [35] turned on the question whether the union had waived its members' *Weingarten* rights by agreeing to a clause that recognized the employer's right "[to] interview any [employee] with respect to any phase of his work without the grievance committee being present." The court first concluded that, while *Weingarten* rights are individual rights, a bargaining representative may lawfully waive them. Then, disagreeing with the Board, the court found that the union had knowingly waived these rights. The court acknowledged that the disputed clause had made its original appearance *prior* to the *Weingarten* decision. However, the court pointed to negotiations which were subsequent to that decision, in which the union unsuccessfuly demanded a new clause essentially recognizing the employees' *Weingarten* rights, objected to the old clause as contrary *Weingarten,* but ultimately agreed to continue it. The court concluded that these circumstances supplied the requisite "clear and unmistakable" evidence that the union knowingly surrendered the employees' statutory rights.

2. Employer Discrimination Against Employees

While participation in a strike in breach of a no-strike clause is unprotected, discipline for such participation violates section 8(a)(3) if it is based on union membership or activities. In two cases, courts have agreed with the Board that, absent specific contractual justification, employers may not select union officers for extra discipline for merely participating in an unprotected walkout. In *Metropolitan Edision,* [36] the Third Circuit sustained the Board's findings that the employer violated section 8(a)(3) by imposing longer suspensions on union officers for failing to take affirmative steps to stop an unauthorized walkout. The court noted that the contract, unlike that in *Gould,* [37] failed to specify that union officials had affirmative responsibilities to end illegal work stoppages. It declined to create such responsibilities from prior arbitration awards adverting to union officials' "affirmative duty" to uphold the contract.

In *Fournelle,* [38] the District of Columbia Circuit found that a prior arbitration award placed a "greater obligation" upon union officials to observe the no-strike clause and authorized the employer to impose the otherwise unlawful selective discipline In *Szewczuga,* [39] the District of Columbia Circuit agreed with the Board that the selective discharge of two union officials was unlawful; the court declined to consider an arbitration award upholding the same discharges because the company had not relied on the award before the Board.

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[35] *Prudential Ins.* v. *N.L.R.B.*, 661 F.2d 398 (5th Cir. 1981).

[36] *Metropolitan Edison Co.* v. *N.L.R.B.*, 663 F.2d 478, cert. granted 102 S. Ct. 2926 (No. 81-1664, June 14, 1982).

[37] *Gould Corp.*, 237 NLRB 881 (1978), enforcement denied 612 F.2d 728 (3d Cir. 1979), cert. denied 449 U.S. 890.

[38] *Fournelle* v. *N.L.R.B.*, 670 F.2d 331.

[39] *Ervin Szewczuga* v. *N.L.R.B.*, 686 F.2d 962.

3. Secondary Boycotts

In *Edward J. DeBartolo Corp.* v. *N.L.R.B.*,[40] the Fourth Circuit upheld the Board's dismissal of a complaint alleging that a union's handbilling at a shopping mall violated section 8(b)(4)(ii)(B) of the Act. DeBartolo Corp., which owns the mall, had standard leases which regulate tenants' use of the premises, hours of business, staffing, and advertising. DeBartolo had also leased adjoining land to the H. J. Wilson Co. so that it might build a department store which would become part of the mall, Wilson in turn hired the H. J. High Construction Co. to build the store. After construction began, a union became embroiled in a primary dispute with High over the payment to its employees of allegedly substandard wages. In order to enlist public support in this dispute, the union handbilled at the mall's entrances asking customers to boycott all of the mall stores because of "[t]he Mall ownership's contribution to substandard wages." The handbill then explained that the Wilson store under construction was being built by "contractors who pay substandard wages and fringe benefits."

The Fourth Circuit agreed with the Board that the union's handbilling was not a violation of section 8(b)(4) because it was within the publicity proviso to that section. The proviso protects "publicity, other than picketing, for the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect" of inducing the employees of any secondary employer to withhold their services or refuse to handle the primary's products. DeBartolo Corp. argued that the handbilling was not within the proviso's protection because the producer-distributor relationship required by the proviso did not exist between High on the one hand and DeBartolo and the mall tenants on the other. The court emphasized, however, that the Board's construction of the Act is entitled to considerable deference,[41] and agreed with the Board that Congress did not intend that the proviso be literally or narrowly construed. The court therefore upheld the Board's conclusion, based on its rationale in *Pet*,[42] and on a line of cases precluding *Pet,* which began with *Lohman Sales,*[43] that one who contributes his labor to a product is a "producer" of that product within the meaning of the proviso, so that, because of the symbiotic relationship between DeBartolo and the mall tenants and among the tenants themselves, in which each attracts customers to the mall for the benefit of all, High, by building the Wilson store, has contributed its labor to the mall enterprise and is therefore a "producer" of that enterprise. This economic link between High and the mall stores was sufficient to bring the union's handbilling within the proviso's protection.

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[40] 662 F. 2d 264, cert. granted October 12, 1982 (No. 81-1985).

[41] The court cited *N.L.R.B.* v. *Loc. Union 103, Iron Workers*, 434 U.S. 335, 350 (1968).

[42] *United Steelworkers (Pet)*, 244 NLRB 96, reversed and remanded 641 F.2d 545 (8th Cir. 1981).

4. The Bargaining Obligation

In two cases, courts passed on the propriety of a union's bargaining to impasse over the inclusion of a contract clause. In one case,[44] the Fifth Circuit, in agreement with the Board, held that the union's insisting on a clause establishing a trust fund to benefit underemployed sheet metal workers was lawful. First, the court approved the Board's refusing to pass on the legality under section 302 of the Act of the provision for the appointment of a trustee. The Board had noted that the clause did not, on its face, violate that section; but, rather, that the alleged violation "hinge[d] upon the interpretation of a complex trust agreement" and that any Board determination of the issue might conflict with a subsequent judicial decision. The Board had also noted that if it found the provision unlawful, it could only enjoin contributions on behalf of employees, because it had no power, as does a district court, to restructure the trust to make it conform to section 302. The court also approved the Board's rejection on evidentiary grounds of the employer's contention that the clause violated section 302 because the trust fund would be used to provide strike benefits, noting that the Board properly placed the burden in an unfair labor practice proceeding on the General Counsel to prove that the trust fund would be used for that purpose. Finally, the court approved the Board's holding that the trustee selection procedures contained in the clause had a sufficient effect on wages, hours, and other conditions of employment to constitute a mandatory bargaining subject. The court noted that a multiemployer fund can provide greater benefits, but, if all employers could select and remove trustees, the fund could not function. Accordingly, the court held that "the record supports the finding by the Board that a sufficient nexus existed between the trustee selection mechanism and the benefits."

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[43] *Intl. Brothd. of Teamsters, Loc. 537 (Lohman Sales Co.),* 132 NLRB 901 (1961); *Local 662, Radio & Television Engineers (Middle South Broadcasting Co.),* 133 NLRB 1698 (1961); *N.L.R.B.* v. *Servette,* 377 U.S. 46 (1964); *N.L.R.B.* v. *Fruit & Vegetable Packers, Loc. 760 (Tree Fruits),* 377 U.S. 58 (1964); *Great Western Broadcasting Corp. d/b/a/ KXTV* v. *N.L.R.B.,* 356 F.2d 434 (9th Cir. 1966), cert. denied 384 U.S. 1002.

[44] *Central Fla. Sheet Metal Contractors Assn.* v. *N.L.R.B.,* 664 F.2d 489.

In the other case,[45] the union insisted on a contract provision requiring nonmembers to pay a pro rata share of the costs and expenses incurred by the union directly related to enforcing and servicing the collective-bargaining agreement, not to exceed the dues and assessments required of union members. The court agreed with the Board that such a fee-for-service clause was barred by applicable state right-to-work laws, valid under section 14(b) of the Act, which allows States to prohibit collective-bargaining agreements requiring membership in a labor organization as a condition of employment." The court majority noted that the four state laws in question, which made it unlawful to require "any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor organization," were virtually identical to the Georgia statute cited when Congress passed section 14(b). The court also noted that in holding section 14(b) applicable to an agency shop agreement—that is, one requiring nonmembers to pay union dues—the Supreme Court stated in *Schermerhorn* that the proviso allowing union-security agreements under section 8(a)(3) and allowing state prohibition of such agreements under section 14(b), clearly are connected and: "Whether they are perfectly coincident, we need not now decide, but unquestionably they overlap to some extent. . . . Whatever may be the status of less stringent union-security arrangements, the agency shop is within § 14(b)."[46] In the court majority's view, the "representation fee" sought here, though "less stringent" than the agency shop, was nevertheless a form of union security contemplated by section 8(a)(3) and 14(b). Finally, the court distinguished cases holding exclusive hiring halls permissible under section 8(a)(3) but not within the reach of section 14(b) because the latter section allows the States to regulate only "post-hiring union security arrangements," not such prehiring arrangements as hiring halls. Judge Mikva, dissenting, would have held the representation fee here a mandatory subject of bargaining. First, he noted the development since 1947 of the duty of fair representation, which requires a union to processs grievances for all those in the represented unit, even though they do not join the union or pay dues to it. He also observed that, although broadly worded state statutes were cited to Congress, they were referred to in debate as simply banning the closed shop and the union shop, not as allowing states to prohibit all payments. He also noted that in rejecting the contention that the arrangement in *Schermerhorn* was something other than an agency shop, the Supreme Court noted the absence of significant distinguishing features, namely, an "ironclad restriction" against using nonmember payments for purposes other than servicing the collective-bargaining agreement, with nonunion members paying no more than their pro rata share of such expenses; both features were incorporated in the representation fee plan here. In Judge Mikva's view, the representation fee does not invoke any form of "membership" under section 8(a)(3), but it is a mandatory subject of bargaining by virtue of section 8(d) as a term and condition of employment.

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[45] *Intl. Union of Plumbers, Locs. 141, 229, 681 & 706* [*Intl. Paper Co.*] v. *N.L.R.B.*, 675 F.2d 1257 (D.C. Cir.).

[46] *Retail Clerks Intl. Assn.* v. *Schermerhorn*, 373 U.S. 746, 751–752 (1963).

E. Remedial Order Provisions

In *Bldg. Material & Dump Truck Drivers, Loc. 36,*[47] the District of Columbia Circuit upheld the Board's decision not to grant a "make whole" remedy in a case involving a bare violation of section 8(e). The union had entered into a collective bargaining agreement with several contractors associations which contained a provision effectively requiring that owner-operators of dump trucks, who were hired through brokers for pickup and delivery work, be members of the union. The Board, finding that that owner-operators were independent contractors rather than employees, concluded that the provision violated section 8(e), as an agreement to cease doing business with non-union owner-operators. Although there was evidence that one or more owner-operators were forced by one broker to join the union, there was no evidence that the union had engaged in any coercion. That broker, who was a signatory to the collective-bargaining agreement (but was not a respondent before the Board), had simply received a letter from the union noting that several owner-operators for whom he made referrals were not union members, and "request[ing]" that they not be "employ[ed]" until cleared by the union.[48] The Board overruled the Administrative Law Judge's recommended order insofar as it required the union and the contractors associations to reimburse owner-operators "for the payment of initiation fees, dues, and contributions deducted for union benefit funds as a result of the enforcement" of the unlawful contract provisions. The Board noted that there was "insufficient evidence [as to] alleged losses directly attributable to actual coercion by Respondents." The Board went on to find "a reimbursement order, typically used to 'make whole' *employees* for violations of the Act, to be generally overbroad and inappropriate in the contest of 8(e) violations," and concluded that a reimbursement order here "would not effectuate the remedial policies of the Act," citing *Carpenters, Loc. 60* v. *N.L.R.B.*, 365 U.S. 651 (1961). The court affirmed the Board, noting that "[i]n the absence of coercion and because union members receive benefits as well as assume burdens, the Board properly finds it inappropriate to order reimbursement of sums paid pursuant to agreements that violate section 8(e); obviously, reimbursement to union members who were not coerced into joining would result in an unjust windfall to them." The court further noted that no violation of section 8(b)(4)(ii)(A), banning union coercion to force employers or self-employed persons to join unions or sign unlawful section 8(e) agreements, was alleged in this case, and that a *sua sponte* finding of such a violation to support a make-whole remedy "would have been improper."

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[47] *Bldg. Material & Dump Truck Drivers, Teamsters Loc. 36* v. *N.L.R.B.*, 669 F.2d 759, affd. *sub nom. Larry Shepard* v. *N.L.R.B.* 112 LRRM 2369 (1983).

[48] 249 NLRB 386, 390 (1980). A simple request by a union, unaccompanied by a strike threat or other pressure, that an employer enforced an agreement violative of section 8(e) does not constitute a threat or coercion proscribed by section 8(b)(4). See *N.L.R.B.* v. *Servette,* 377 U.S. 46 (1964), *Teamsters Loc. 20* v. *Morton,* 377 U.S. 252, 259 (1964).

In *Joint Council of Teamsters, No. 42,*[49] however, the Ninth Circuit reached a different conclusion in a case involving a substantially similar contract and working arrangements. There, the Board's finding of an 8(e) violation was based on a factual stipulation which included the disputed contract provisions, but no evidence that anyone had joined the union due to the existence of the contract, although there was evidence that, in one instance, the union forced nonunion drivers off a job in violation of section 8(b)(4)(ii)(A).[50] Consequently, the Board denied a request that it require the respondent unions to reimburse owner-operators "for payment of initiation fees and dues, deducted contributions to union benefit funds, or income lost by reason of the enforcement" of the unlawful contract terms. The Board invoked essentially the same reasons given in *Bldg. Material & Dump Truck Drivers, Loc. 36,* adding that "the remedial issue [had not] been expressly litigated." The Board further noted, as it had in *Bldg. Material & Dump Truck Drivers, Loc. 36,* that "aggrieved owner-operators engaged in business as independent contractors may pursue a damage claim under Sec. 303 of the Act." The Ninth Circuit enforced the Board's unfair labor practice findings, but remanded the remedy portion of the Board's order, holding that "when an unlawful collective bargaining agreement is itself coercive, there is no logical reason for denying reimbursement because of the absence of a technical § 8(b)(4) violation." Consequently, the court, while expressing no opinion as "to whether the Board should order compensation for lost income resulting from enforcement" of the unlawful provision, remanded "to the Board to fashion a make-whole remedy or to show good cause why a make-whole remedy would not effectuate the purposes of the Act." [51]

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[49] *Joint Council of Teamsters, No. 42* v. *N.L.R.B.*, 671 F.2d 305, petition for cert. pending (No. 82-3).

[50] 248 NLRB 808, 813 (1980).

The Ninth Circuit denied enforcement to part of the Board's make-whole remedy in *Rayner* v. *N.L.R.B.*[52] The company had entered into, but had never honored, a 3-year contract with the union. When the contract was about to expire in 1978, the company notified the union that, without prejudice to the company's position that no binding agreement ever existed [53]—because the union allegedly never obtained a majority support after signing a prehire agreement as provided under section 8(f)—it wished to terminate the agreement and bargain for a new contract. The union did not respond to the company's offer. The court agreed with the Board that the company had violated section 8(a)(5) and (1) by refusing to honor the contract. Although recognizing that employers are required by section 8(a)(5) to maintain the status quo as to wages and working conditions following the expiration date of a contract, the court, in disagreement with the Board, tolled the company's obligation to make pension and other benefit contributions, as of the date it offered to bargain with the union. The court concluded that the Board, "by emphasizing the company's prolonged transgressions under the terminated agreement, discounted the opportunity presented to the union by the 1978 notice to negotiate, by declaring that 'negotiations against a background of unremedied unfair labor practices would have been an exercise in futility.' " [54] Finding that "[t]here is nothing in the record to support any supposition that the company would not negotiate a new contract in good faith or fail to perform under any new contract," the court held that the Board's continuation of the make-whole remedy despite the company's bargaining offer was punitive.

In *Drug Package Co.*,[55] the Board held that employees who struck for recognition after their employer rejected a demand for recognition by a majority union and committed unfair labor practices justifying a *Gissel* bargaining order were unfair labor practice strikers entitled to reinstatement upon application. The District of Columbia Circuit approved the Board's *Drug Package* doctrine in *John Cuneo*,[56] noting first that the treatment of the employees as unfair labor practice strikers flowed logically from the imposition of a retroactive bargaining order, for such an order is based on the conclusion that the employer's refusal to recognize and bargain with the majority union was a violation of section 8(a)(5). The court also concluded that the treatment of the employees as unfair labor practice strikers appropriately remedied the harm from the employer's unlawful conduct; that is, the interference with employees' free expression of union preferences in a Board election and the economic harm to employees participating in a lawful strike for recognition. Finally, the possibility that striking employees might be treated as unfair labor practice strikers tends to deter an employer from embarking on a course of illegal conduct designed to destroy a union's majority was an additional factor leading the court to approve *Drug Package*.

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[51] As noted, *supra*, fn. 47, the Supreme Court granted the charging party's petition for a writ of certiorari in *Bldg. Material & Dump Truck Drivers, Loc. 36*, which was orally argued before the Court on December 6, 1982. The respondent unions filed a petition for a writ of certiorari in *Joint Council of Teamsters, No. 42*, which was pending as of December 31, 1982.

[52] *Gordon Rayner, d/b/a/ Bay Area Sealers* v. *N.L.R.B.*, 665 F.2d 970.

[53] The company contended that it signed an 8(f) agreement that was unenforceable based on the union's alleged failure to obtain majority support.

[54] 251 NLRB 89, 90, fn. 5 (1980).

[55] 228 NLRB 108 (1977).

[56] *Road Sprinkler Fitters Loc. 669* [*John Cuneo*] v. *N.L.R.B.*, 681 F.2d 11 (D.C. Cir.).

VIII

Injunction Litigation

A. Injunctive Litigation Under Section 10(j)

Section 10(j) empowers the Board, in its discretion, after issuance of an unfair labor practice complaint against an employer or a labor organization, to petition a U.S. district court for appropriate temporary relief or restraining order in aid of the unfair labor practice proceeding pending before the Board. In fiscal 1982, the Board filed 43 petitions for temporary relief under the discretionary provisions of section 10(j): 38 against employers and 5 against unions. Of this number, together with petitions pending in court at the beginning of this report period, injunctions were granted by the courts in 23 cases and denied in 8. Of the remaining cases, 15 were settled prior to court action, 4 were withdrawn, and 9 were pending further processing in court.[1]

Injunctions were obtained against employers in 20 cases and against labor organizations in 3 cases. The cases against employers variously involved alleged interference with organizational activity, subcontracting of unit work and other aspects of bad-faith bargaining, minority union recognition, segregation of assets, and interference with access to Board processes. The cases against unions variously involved alleged minority union recognition, picketing without satisfying the notice requirements for strikes under sections 8(d) and 8(g), and mass picketing and violence.

In fiscal 1982, the circuit courts affirmed four injuctions granted pursuant to section 10(j), vacated one injunction, and granted an emergency motion for an injunction pending appeal. In *Wilson* v. *Liberty Homes,*[2] the Seventh Circuit affirmed a district court order directing a manufacturer of mobile homes to restore its discriminatorily subcontracted delivery operation, to reinstate the terminated truckdrivers, and to recognize and bargain with the union which had secured signed authorization cards from a majority of the drivers. On the Board's cross-appeal from the district court's refusal to grant a cease-and-desist order, the court of appeals remanded with instructions to enter an appropriate order directing the employer to refrain from further unfair labor practices pending the Board's final disposition of the case. However, because the court's October 7 opinion issued some 3 weeks after the Board's September 17 decision on the merits,[3] the court issued a subsequent order withdrawing its opinion of October 7 and dismissing the appeal as moot.

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[1] See Table 20.

[2] 108 LRRM 2699 (7th Cir. 1981), affig. in part and reversing in part 108 LRRM 2688 (D.C. Wis. 1980), 45 NLRB Ann. Rep. 207 (1979), withdrawn from publication and dismissed as moot 660 F.2d 620 (7th Cir. 1982).

In *Squillacote* v. *Advertisers Mfg. Co.*,[4] the Seventh Circuit agreed that there was reasonable cause to believe that an employer violated section 8(a)(5) of the Act by unilaterally altering working conditions while it was challenging the results of a Board-conducted election in which a majority of employees had voted in favor of union representation. Accordingly, the court affirmed an injunction under section 10(j) which directed that the employer, *inter alia*, rescind one change in working conditions and refrain from making further significant changes in employees' terms and conditions of employment, without first bargaining with the union, pending a final Board order. In rejecting the employer's contention that the relief granted went beyond merely preserving the status quo, the court observed that the injunction did not contain a general bargaining order requiring the employer to bargain with the union pending its challenge to the election; it "merely restores the *status quo* in significant terms and conditions of employment, in the absence of bargaining, as of the date of the election." [5]

In *Sheeran* v. *American Commerical Lines*,[6] the Sixth Circuit upheld the district court's finding of reasonable cause to believe the employer had violated section 8(a)(5) of the Act by failing to comply, during the term of a collective-bargaining agreement, with its contractual duty to permit access to its vessels by union representatives and to hire employees through a union-operated hiring hall, and by continuing this course of conduct, after the contract had expired, without bargaining with the union to a good-faith impasse. In affirming the injunction requiring the employer to comply fully with these contract provisions, pending a final Board order, the court observed that "[t]he hiring hall and vessel access provisions of the agreement were important rights which the Union has acquired through collective bargaining" and that, where "the efficacy of the Board's final order may be nullified" in the absence of injunctive relief, "[p]reservation and restoration of the status quo are then appropriate considerations in granting temporary relief pending determination of the issues by the Board." [7] Although in affirming the injunction as granted, the court rejected the employer's contention that the district court abused its discretion in failing to place a limit on the injunction's duration, the court recognized that undue delay by the Board in processing the underlying case could result in the temporary injunction becoming, in effect, the final disposition of the controversy.[8] Accordingly, the court directed the Board to proceed "in the most expeditious manner possible" and remanded the case to the district court with instructions to entertain a motion to place time limits on the injunction and to consider, in that regard, "the particular circumstances of this case and especially the time required for the NLRB to resolve the underlying proceedings if the case were handled as expeditiously as possible."[9]

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[3] *Liberty Homes*, 257 NLRB 1411 (1981).

[4] 677 F.2d 544 (7th Cir.), affg. Docket 81–C–343 (D.C. Wis. 1981), 46 NLRB Ann. Rep. 142 (1980).

[5] 677 F. 2d 547.

[6] 683 F.2d 970 (6th Cir.), affg. No. C–80–0251–L(A) (D.C. Ky. 1980.)

[7] 683 F.2d at 979, quoting *Angle* v. *Sacks*, 382 F.2d 655, 660 (10th Cir. 1967).

In *Fuchs* v. *John Mahoney Constr. Co.*,[10] the First Circuit affirmed an unusual injunction granted pursuant to section 10(j). The regional director had petitioned for an injunction directing the employer, *inter alia,* to reinstate two employees who allegedly were discharged for engaging in union activities and to recognize and bargain with the union which had secured signed authorization cards from a majority of employees before the employer allegedly commenced a campaign of serious unfair labor practices. The district court agreed to decide the petition on the basis of the record to be made before the Board's administrative law judge in the underlying unfair labor practice proceeding. When the hearing opened, the employer and the union announced that they had reached a private settlement agreement, by the terms of which the employer agreed to reinstate the discharged employees and make them whole and to recognize the union and execute the union's standard labor agreement. The terms of the settlement agreement were read into the record and, upon the motion of counsel for the General Counsel, the administrative law judge dismissed the complaint subject to notification of compliance with the terms of the settlement. When the employer refused to comply with the settlement terms, counsel for the General Counsel moved the administrative law judge to reinstate the complaint and the regional director renewed his prayer for injunctive relief in the district court. Concluding that the entire matter then before it already had been settled in the ancillary administrative proceedings, the district court entered an order directing the employer, pending the outcome of Board proceedings, to comply with all of the terms of the settlement agreement. After oral argument on the employer's motion for a stay pending appeal in the First Circuit, the court of appeals denied the stay and, proceeding to the merits without further briefing or argument, affirmed the district court order with the *caveat* that all actions taken by the employer were subject to the final outcome of the underlying unfair labor practice proceedings.

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[8] 683 F.2d at 980.

[9] 683 F.2d at 981.

[10] No. 81-1674 (1st Cir.), affg. Civil No. 80-2703-T (D.C. Mass. 1981).

In the only appellate court decision adverse to the Board, the Second Circuit vacated an injunction in *Silverman* v. *40–41 Realty Associates,*[11] on the ground that the regional director's theory of law was too "novel" and "unprecedented" to support the issuance of an injunction in other than "the most compelling circumstances." Relying principally on the decision in *Seattle-First Natl. Bank* v. *N.L.R.B.,*[12] the district court had found reasonable cause to believe that a dental facility and the owner of a 20-story office building violated section 8(a)(1) of the Act by refusing to allow an employee and a union agent to picket in front of the dental facility's office on the second floor of the building. Noting that *Seattle-First* and other cases relied on by the regional director involved picketing in areas which more closely resembled a public sidewalk than did the second floor corridor there in issue, the court of appeals held that the Board and courts had not yet "authoritatively construed" the Act to permit "interior picketing" in such circumstances.[13] Expressing the view that a temporary injunction is "extraordinary" relief which is appropriate only "when there have been flagrant violations of the Act or there is an overriding need to preserve the status quo," the court concluded that the injunction was not "just and proper" because neither criterion was met; the alleged violations could not be characterized as "flagrant," in the absence of "authoritative rulings" concerning interior picketing in the particular circumstances, and there was no "overriding need" for injunctive relief, inasmuch as the union could "air its grievances adequately" on the public sidewalk outside of the building.[14]

The only other significant appellate court action under section 10(j) occurred in *Miller* v. *Ralph K. Davies Medical Center,*[15] where the Ninth Circuit granted injunctive relief, pending appeal, on the basis of an emergency motion filed by the Board earlier on the same day. The regional director had petitioned the district court for an injunction to prevent the medical center from terminating its voluntary participation in the social security system on the basis of his reasonable cause to believe that the medical center was violating section 8(a)(5) and section 8(d) of the Act and that its threatened termination of social security coverage would, under applicable Federal law,[16] be permanent and irrevocable. Under the Federal laws governing the voluntary participation by nonprofit organizations in social security, such an organization may terminate its participation by filing a notice of termination with the Internal Revenue Service at least 2 years prior to the termination date specified in the notice.[17] Regardless of the termination date specified in the notice, however, the notice does not become effective to terminate social security coverage until the close of the calendar quarter in which the specified termination date occurs.[18] An organization may revoke its notice of termination, in writing, any time prior to its becoming effective but, once it becomes effective, the organization is barred from ever again participating in the social security system.[19] At the time the case was litigated, the Internal Revenue Service's policy was to deny any extension of the termination date specified in a notice of termination and to treat the notice of termination as confidential tax information, privileged from disclosure to employees, unions, and others.[20]

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[11] 688 F.2d 678 (2d Cir.), vacating Docket 81–Civ.–3291 (D.C. N.Y. 1981), 46 NLRB Ann. Rep. 142 (1980).

[12] 651 F.2d 1272 (9th Cir. 1980).

[13] 668 F.2d at 680–681.

[14] 668 F.2d at 681–682.

[15] No. C 82–3178 RPA (D.C. Ca.), injunction pending appeal granted June 30, 1982 (9th Cir.

The regional director's petition alleged that the medical center had violated and was violating sections 8(a)(5) and 8(d) of the Act: by filing a notice of termination, without first notifying or bargaining with the union, in June 1980, during the term of a collective-bargaining agreement which implicitly provided for continued social security coverage; by concealing the fact that it had filed a notice of termination from the union during subsequent negotiations for a new agreement, which negotiations included discussion of the medical center's private pension plan that was designed to supplement basic social security coverage; by delaying until January 1982 before informing the union that it had filed a notice of termination which would become effective after June 30, 1982; and, by announcing its final decision to allow social security coverage to terminate, without bargaining with the union to agreement or a good-faith impasse. On June 29 1982, the district court concluded that there was not reasonable cause to believe the Act had been violated because, in the court's view, the collective-bargaining agreement did not expressly require the medical center to maintain social security coverage and the 6 months' notice provided by the medical center afforded an adequate opportunity for bargaining.

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[16] Internal Revenue Code, 26 U.S.C. § 3121(K)(3).
[17] 26 U.S.C. § 3121(K)(1)(D).
[18] *Ibid.*
[19] 26 U.S.C. §§ 3121(K)(1)(D) and 3121(K)(3).
[20] The Internal Revenue Service since has amended its policy extensions of the termination date and to disclose to employees or their representative, upon request, information concerning a notice of termination filed by their employer.

On June 30, 1982, with the notice of termination set to become effective to irrevokably terminate the medical center's social security coverage at midnight, the Board filed an emergency motion requesting that the Ninth Circuit issue an order directing the medical center to revoke its notice of termination before it became effective. Although it declined to grant the relief sought by the Board, the court issued an order, that same day, which prevented the medical center's withdrawal from social security by staying, pending appeal, the running of the 2-year notice period. Oral argument on the merits of the appeal was heard on September 15, 1982, and the case currently is pending decision.

Several noteworthy injunctions were granted by district courts in fiscal 1982. In *Hoffman* v. *Cross Sound Ferry Service,*[21] the district court agreed with the regional director's assertion that the employer's alleged unlawful discharge of five active union supporters, in conjunction with its alleged threats and intimidation of other employees, "has effectively nipped the union campaign in the bud, and that the lingering effect of these discharges has chilled any further exercise of Section 7 rights by the people still working for the respondent."[22] Accordingly, the court concluded that a reinstatement order, along with an order enjoining further unfair labor practices pending a final Board order, was "necessary to restore the *status quo ante,* i.e. to facilitate the resurrection of the unionization campaign that was effectively halted by the unfair labor practices allegedly committed by the respondent."[23]

In *Zipp* v. *Bohn Heat Transfer Group,*[24] the district court enjoined the employer, pending Board proceedings, from relocating its operation and terminating employees during the term of a collective-bargaining agreement, without the union's consent, for the purpose of avoiding the provisions of the collective-bargaining agreement. The order also directed the employer to fully restore its operations, to bargain in good faith with the union concerning the question of relocation, and to furnish the union with requested information necessary and relevant to bargaining on the subject of relocation. Relying on *Los Angeles Marine Hardware Co.* v. *N.L.R.B.,*[25] the district court found reasonable cause to believe that the employer had violated the Act by removing bargaining unit work to another facility during the term of the collective bargaining, without the union's consent, because a "relocation motivated by an attempt to avoid the provision of a collective-bargaining agreement constitutes an unfair labor practice."[26] In concluding that the requested temporary injunctive relief was just and proper to "maintain the *status quo*," the district court relied on the fact that a final Board order requiring the employer to restore its operations long after the relocation had been accomplished would "unduly burden the employer and employees" and that the Seventh Circuit has been reluctant to enforce the Board's restoration orders in those circumstances.[27] The court also observed that a final Board order requiring restoration, even if judicially enforced, would be ineffective to protect the union and the employees because, during the lengthy administrative and judicial proceedings, many of the displaced employees likely would "move to other parts of the country in search of work. Those workers might be unwilling to return if the Board, in final disposition, entered a restoration order. The result would be erosion of the Union's base of support."[28]

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[21] 109 LRRM 2884 (D.C. Conn.).
[22] 109 LRRM at 2888.
[23] 109 LRRM at 2889.
[24] 110 LRRM 3013 (D.C. Ill.).
[25] 602 F.2d 1302 (9th Cir. 1979).

In *Maram* v. *Alle Arecibo Corp.*,[29] the district order enjoined an employer who had closed its business from, in any manner, dissipating its assets, without the court's approval, pending Board proceedings. In concluding that such relief was necessary to prevent the Board's order from being rendered meaningless, the court held that there was reasonable cause to believe that, during the 9 months preceding its cessation of operations, the employer had violated the Act, by *inter alia*, terminating 15 employees and failing to make contractually required payments to the union's health and welfare fund. Since the employer was attempting to sell or otherwise transfer its equipment, inventory, and other assets and had refused voluntarily to set aside sufficient funds to satisfy a potential monetary Board order, the court held that an order preserving the employer's assets, pending final resolution of the unfair labor practice proceedings, was just and proper to prevent frustration of the purposes and policies of the Act.

Two district courts granted noteworthy injunctions without published opinions. In *Nelson* v. *Albertson's*,[30] the district court ordered an employer, who had relocated his retail establishment during the term of collective-bargaining agreements covering three units of employees, to recognize the three unions and to apply the terms of the three agreements at the new location, where it was carrying on substantially the same business with a majority of the employees who had worked at the former location. In *Hirsch* v. *Pilgrim Life Ins. Co.,*[31] the district court granted an injunction prohibiting an employer from further maintaining, prosecuting, or participating in a civil law suit it had filed against an employee and her union in retaliating for their having filed an unfair labor practice charge against the employer. The regional director's petition had alleged that permitting the employer to prosecute the blatantly retaliatory action, pending a final Board order, would do irreparable harm to the statutory policy of maintaining full and free access to the Board's processes by exposing the employees and the union to a continuing risk of having to defend against maliciously brought lawsuits as a consequence of filing charges with the Board.

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[26] 110 LRRM at 3015.
[27] *Ibid.*
[28] *Ibid.*
[29] 110 LRRM 2495 (D.C.P.R.).
[30] Civil No. 82-1202 (D.C., Idaho).

B. Injunctive Litigation Under Section 10(l)

Section 10(l) imposes a mandatory duty on the Board to petition for "appropriate injunctive relief" against a labor organization or its agent charged with a violation of section 8(b)(4) (A), (B), and (C),[32] or section 8(b)(7),[33] and against an employer or union charged with a violation of section 8(e),[34] whenever the General Counsel's investigation reveals "reasonable cause to believe that such charge is true and a complaint should issue." In cases arising under section 8(b)(7), however, a district court injunction may not be sought if a charge under section 8(a)(2) of the Act has been filed alleging that the employer had dominated or interfered with the formation or administration of a labor organization and, after investigation, there is "reasonable cause to believe such charge is true and that a complaint should issue." Section 10(l) also provides that its provisions shall be applicable, "where such a relief is appropriate," to violations of section 8(b)(4)(D) of the Act, which prohibits strikes and other coercive conduct in support of jurisdictional disputes. In addition, under section 10(l) a temporary restraining order pending the hearing on the petition for an injunction may be obtained, without notice to the respondent, upon a showing that "substantial and irreparable injury to the charging party will be unavoidable" unless immediate injunctive relief is granted. Such ex parte relief, however, may not extend beyond 5 days.

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[31] No. 82-1288 (D.C. Pa.).

[32] Sec. 8(b)(4) (A), (B), and (C), as enacted by the Labor Management Relations Act of 1947, prohibited certain types of secondary strikes and boycotts, strikes to compel employers or self-employed persons to join labor employer organizations, and strikes against Board certifications of bargaining representatives. These provisions were enlarged by the 1959 amendments of the Act (Title VII of Labor Management-Reporting and Disclosure Act) to prohibit not only strikes and the inducement or work stoppages for these objects but also to proscribe threats, coercion, and restraint addressed to employers for these objects, and to prohibit conduct of this nature where an object was to compel an employer to enter into a hot cargo agreement declared unlawful in another section of the Act, sec. 8(e).

[33] Sec. 8(b)(7), incorporated in the Act by the 1959 amendments, makes organizational or recognitional picketing under certain circumstances an unfair labor practice.

[34] Sec. 8(e), also incorporated in the Act by the 1959 amendments, makes hot cargo agreements lawful and unenforceable, with certain exceptions for the construction and garment industries.

In this report period, the Board filed 100 petitions for injunctions under section 10(l). Of the total caseload, comprised of this number together with 17 cases pending at the beginning of the period, 38 cases were settled, 5 dismissed, 2 continued in an inactive status, and 1 was withdrawn.[35] During this period, 73 petitions went to final order, the courts granting injunctions in 65 cases and denying them in 8 cases. Injunctions were issued in 34 cases involving secondary boycott action proscribed by section 8(b)(4)(B), as well as violations of section 8(b)(4)(A) which proscribed certain conduct to obtain hot cargo agreements barred by section 8(e). Injunctions were granted in 18 cases involving jurisdictional disputes in violation of section 8(b)(4)(D). Injunctions were issued in 11 cases to proscribe alleged recognitional or organizational picketing in violations of section 8(b)(7). The remaining two cases in which injunctions were granted arose out of charges involving violations of section 8(b)(7)(A).

Of the eight cases in which injunctions were denied, six involved secondary picketing activity by labor organization, one involved 8(b)(4)(B) and 8(b)(4)(D), and one involved 8(b)(7)(A).

Only two 10(l) cases were decided at the appellate court level in fiscal 1982. In *Nelson* v. *Northwest Log Scalers Assn.*,[36] and *Mercer* v. *Northwest Log Scalers Assn.*[37] consolidated cases arising out of the same labor dispute, the Ninth Circuit reversed the district court and granted temporary injunctive relief on the Board's emergency motions. The cases arose under section 8(b)(4)(B) and involved application of the Board's ally doctrine in unique factual circumstances. The union-represented employees of the Puget Sound Log Scaling Bureau, a nonprofit membership corporation which performs log scaling and grading services for both members and nonmembers engaged in the lumber industry, struck the Bureau in support of their demands in negotiations for a new labor agreement. When the employees directed their picketing appeals to employees and suppliers of an employer-member of the Bureau, several charges were filed and the regional director petitioned for injunctive relief under section 10(l). In two separately litigated proceedings, the district court denied injunctive relief on the ground that the picketed employer-members were allies of the Bureau for purposes of section 8(b)(4)(B) of the Act. The district court based is ally finding on evidence that management officials employed by the picketing employer-members also served as members of the Bureau's board of directors and negotiating committee and that many of the employees' terms and conditions of employment were dictated by the employer-members, rather than the Bureau, when the employees were performing services on the employer-members' premises.

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[35] See Table 20.

[36] No. 82-3263 (9th Cir.), reversing and remanding C-82-265 JET (W.D. Wash.).

[37] No. 82-3301 (9th Cir.), reversing and remanding C-82-283 JET (W.D. Wash.).

In both cases, the Board appealed and moved, on an emergency basis, for injunctive relief pending appeal. The Board argued that there was at least reasonable cause to believe that the employer-members were neutral in the Bureau's dispute with its employees. In this regard, the Board contended that an employer-members' ownership of one of the Bureau's 160 outstanding shares of stock did not constitute a significant ownership interest in the Bureau and that the mere participation of an employer-member's employee on the Bureau's board of directors and negotiating committee did not, without more, conclusively establish that the employer-member exercise actual control over the Bureau's labor relations policy. The Board argued further that the scant evidence of employer-members setting employees' terms and conditions of employment while working at the employer-members' premises established nothing more than the normal customer control which is inherent in any arm's-length relationship between a service contractor and its customers.

The Ninth Circuit consolidated the Board's emergency motions for injunctive relief pending appeal and, without oral argument or further briefing on the merits of the appeals, issued a decision reversing the district court, remanding for the issuance of injunctive relief, and granting injunctive relief pending the entry of 10(l) relief by the district court. In an unpublished opinion, the court held that the district court had erred in failing properly to confine its inquiry to the reasonable cause standard as it is applied by the Ninth Circuit; namely, whether the regional director's factual allegations and legal propositions are "not insubstantial and frivolous." [38] Applying that standard, the court found that there was reasonable cause to believe that the union had violated and was violating section 8(b)(4)(B) of the Act.

Bentz v. *General Longshore Workers, ILA Loc. 1418,* [39] was a 10(l) case which reached the Fifth Circuit in a somewhat unusual posture. In 1975, the regional director had petitioned for injunctive relief to restrain locals of the ILA from enforcing provisions of its collective-bargaining agreement with the New Orleans Steamship Association (NOSSA), under which they collected certain royalties from stevedores and steamship companies which were members of NOSSA. The district court found reasonable cause to believe that the contract provisions in issue were unlawful under section 8(e) of the Act but declined to enjoin the collection of royalties on the basis of representations by ILA and NOSSA that retroactive collection of royalties would be unfeasible in the event the Board found the contract provisions to be lawful. Instead, the court ordered that all royalties collected be paid into the registry of the court and held in escrow pending the Board's final disposition of the underlying unfair labor practice case.

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[38] Citing *San Francisco-Oakland Newspaper Guild* v. *Kennedy,* 412 F.2d 541, 544 (9th Cir. 1969).

[39] No. 81-3114 (5th Cir.) aff. Civ. Action No. 75-3223-H (D.C. La. 1981), cert. denied No. 81-2384, October 12, 1982.

In 1978, the Board issued a decision and order[40] finding the contract provisions to be unlawful under section 8(e) and ordering the parties to refrain from enforcing them. Citing *Loc. 12, Operating Engineers (Acco Constr. Equipment)*,[41] the Board rejected the General Counsel's request that the ILA be ordered to reimburse those who had paid royalties during the period commencing 6 months before the charges were filed and ending with the entry of the district court's escrow order. Following issuance of the Board's final order, the regional director moved the district court to distribute the more than $1 million in escrow royalty payments to the members of NOSSA who had paid them. Numerous shippers and other customers of NOSSA members intervened and laid claim to funds on the ground that NOSSA members had passed on to them the costs of the royalties. The ILA locals claimed that they were entitled to the funds because the Board had declined to grant a reimbursement order.

After lengthy proceedings, the district court directed that the funds be distributed to those who ultimately had incurred the cost of the royalties. In rejecting the ILA locals' argument that they were entitled to the funds, the court noted that it had fashioned its order to protect the interests of all parties, pending litigation before the Board. Since the only interest of the ILA locals which the order sought to protect was its interest in having the funds available in the event the royalty provisions were found to be lawful, it would defeat the purpose of the order to distribute the funds to the ILA locals when the royalty provisions were found to be unlawful by the Board. Concerning the Board's rejection of a reimbursement remedy, the district court held that the Board's decision addressed only those royalties actually collected prior to entry of the escrow order and did not purport to resolve the question of how the escrowed funds should be distributed.

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[40] *General Longshore Wkrs., ILA*, 235 NLRB 161.
[41] 204 NLRB 742 (1973).

On appeal of the Fifth Circuit, the court, without opinion, affirmed the district court.

IX

Contempt Litigation

During fiscal 1982, petitions for adjudication in civil contempt for noncompliance with decrees enforcing Board orders were filed in 28 cases, 10 of which were granted and civil contempt adjudicated;[1] in one of these, the court assessed the prospective fine which had been imposed in the earlier contempt adjudication,[2] and, in another, the court directed the civil arrest of the respondent's president because of his continued disregard of the court's.[3] One case was discontinued upon full compliance with the terms of the underlying judgment,[4] while one was dismissed because the court deemed that the alleged violation was not within the scope of the prior judgment.[5] In four cases, the courts referred the issues to special masters for trials and recommendations: One to a United States district court judge;[6] one to a United States Magistrate;[7] and two to other experienced triers.[8] Two cases are awaiting referral to a special master.[9]

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[1] *N.L.R.B.*.v. *Atlantic Business & Community Development Corp.* by order of April 13, 1982 (No. 82-3044), in civil contempt of the bargaining provisions of the judgment entered April 23, 1980, in No. 80-1363, and of the backpay judgment entered July 17, 1981, in No. 81-1867 (3d Cir.), *N.L.R.B.* v. *Dominion Tool & Die Co.*, by order of August 24, 1982, in civil contempt of the bargaining provisions of the judgment entered June 26, 1980, in No. 78-1187 (623 F.2d 484) (6th Cir.); *N.L.R.B.* v. *Oldwick Materials* by order of December 22, 1981 (No. 81-2868), in civil contempt of the bargaining provisions of the judgment entered February 24, 1981, in No. 81-1101 (3d Cir.); *N.L.R.B.* v. *Pignotti Sheet Metal* by order of May 12, 1982, in civil contempt of the notice-posting provision of the judgment entered October 23, 1981, in No. 81-2033 (8th Cir.); *N.L.R.B.* v. *Pilgrim life Ins. Co.* by order of August 30, 1982 (No. 82-3387), in civil contempt of the 8(a)(1), (3), and (5) provisions of the judgment entered May 21, 1981, in No. 80-2085 (659 F.2d 1070 (3d Cir.); *N.L.R.B.* v. *RTC, d/b/a Rzepka Trucking Co.*, by order of January 25, 1982, in civil contempt of the backpay judgment entered April 27, 1981, in No. 81-1532 (7th Cir.); *N.L.R.B.* v. *Skycap Services*, by order of July 21, 1982, in civil contempt of the bargaining provisions of the judgment entered November 27, 1981 in No. 81-2297 (10th Cir.); *N.L.R.B.* v. *Streator Glass & Mirror Co.* by order of April 8, 1981, in civil contempt of the bargaining, notice-posting and record production provisions of the judgment entered September 24, 1981, in No. 81-2381 (7th Cir.).

[2] *N.L.R.B.* v. *David D. Sutherland, d/b/a Maaco Auto Painting & Body Work*, by order of October 13, 1981, assessing conditional fine for failure to comply with the contempt adjudication entered August 17, 1981 (656 F.2d 359), requiring reinstatement, notice-posting, and submission of records pursuant to the judgment of April 21, 1981 (80-1678) (646 F.2d 1273 (8th Cir.)).

[3] *N.L.R.B.* v. *Streator Glass & Mirror Co.* by order of August 19, 1982, ordering body attachment for failure to comply with bargaining, notice-posting, and record production provisions of the contempt adjudication of April 8, 1982, based on violation of the underlying judgment of September 24, 1981 (No. 81-2381) (7th Cir.).

[4] *N.L.R.B.* v. *Tucker Enterprises, d/b/a Tucker's Minit Markets & Horace A. Tucker*, by order of April 20, 1982, upon offers of reinstatement and payment of backpay, in compliance with the judgment of November 21, 1980, in No. 79-1148 (6th Cir.).

[5] *Great Lakes Steel* v. *N.L.R.B.* by order of December 3, 1981, dismissing contempt petition alleging violations of the judgment of July 15, 1980, in No. 78-1299 (625 F.2d 131 (6th Cir.)).

The remaining 10 cases are before the courts in various stages of litigation: two await the filing of an answer by the respondent;[10] one awaits disposition of the Board's motion for summary adjudication in civil contempt;[11] two are being held in abeyance pending determination of the respondents' compliance;[12] one awaits entry of a consent order;[13] two await disposition of Board's motion to discontinue proceedings without prejudice after compliance by respondent;[14] in one a motion is pending to discontinue the proceedings after respondent's inability to comply was established to the Board's satisfaction;[15] and one awaits ruling on the Board's motion for body attachment for violation of a protective restraining order.[16] In addition, during the fiscal year, protective orders enjoining the dissipation of assets were obtained in four cases,[17] and discovery orders were entered in four cases,[18] denied in two others,[19] and a motion for discovery is pending in another.[20]

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[6] To United States District Judge Constance Baker Motley (order of January 14, 1982) in *N.L.R.B.* v. *Dist. 1199, Natl. Union of Hospital & Health Care Employees, RWDSU, AFL-CIO, and Leon J. Davis, Jessie Olson and Edward Kay (Woodhull Care Center Associates),* in Civil contempt of the picket line violence provisions of the judgment of May 22, 1980, in No. 81-4031 (2d Cir.).

[7] To United States Magistrate Robert E. Cowen (order of February 25, 1982) in *N.L.R.B.* v. *General Motors Corp.* in civil contempt of the 8(a)(1), (3), and (5) provisions of the judgments of April 21, 1976, in No. 75-1750 and December 12, 1978, in No. 78-2427 (3d Cir.).

[8] To Administrative Law Judge Marvin H. Morris (order of September 14, 1982) in *N.L.R.B.* v. *Maine Caterers, & William H. Maine* in civil contempt of the bargaining and notice-posting provisions of the judgment of July 16, 1981, in No. 80-1778 (1st Cir.); to Administrative Law Judge Dee C. Blythe (order of May 19, 1982), in *N.L.R.B.* v. *Southwestern Bell Telephone Co.,* in civil contempt of the 8(a)(1) and (5) provisions of the judgments of May 16, 1978, in Nos. 78-1911 and 78-1914 (5th Cir.).

[9] *N.L.R.B.* v. *Laborers Fund Corp.,* on petition for civil contempt of the recission of changes provisions of the judgment of September 30, 1981, in No. 81-7401 (9th Cir.); *N.L.R.B.* v. *Riley Aeronautics Corp.* on petition for civil contempt of the reinstatement and backpay provisions of the judgments of June 28, 1967 (377 F.2d 557), and October 22, 1970, in No. 3074 (11th Cir.).

[10] *N.L.R.B.* v. *Hennepin Broadcasting Associates, d/b/a KCTR Radio & Albert S. Tedesco,* on petition for civil contempt of the 8(a)(1), (3), and (5) provisions of the judgment of February 16, 1977, in No. 75-1108 (8th Cir.), *N.L.R.B.* v. *Rosario A. Tosto d/b/a Father & Son Maintenance Contracting Co. & Father & Sons Contractors, Father & Son Plastering, Painting & Drywall, Father & Sons Maintenance & Contracting Inc., Father & Sons Maintenance & Construction, and Father & Son Maintenance* on petition for civil contempt of the provisions of the judgment of September 23, 1981, requiring payments to contractually establish union fringe benefits funds, in No. 81-1573 (6th Cir.).

[11] *N.L.R.B.* v. *Western Truck Services,* on petition for civil contempt of the bargaining, notice-posting, and record production provisions of the judgment of May 26, 1981, in No. 81-7066 (9th Cir.).

[12] *N.L.R.B.* v. *FMG Industries d/b/a GAMCO Industries* on petition for civil contempt of the bargaining and notice-posting provisions of the judgment of May 7, 1981 in No. 81-7180 (9th Cir.); *N.L.R.B.* v. *Jaline Togs, and Milton Shenkman,* on motion for civil contempt of the bargaining order provisions of the judgment of February 21, 1979, in No. 79-4036 (2d Cir.).

[13] *N.L.R.B.* v. *Haddon House Food Products & Flavor Delight,* on petition for civil contempt of the union-access and notice-posting provisions of the judgment of November 4, 1981 (640 F.2d 392) in Nos. 79-1619 and 79-2018 (D.C. Cir.).

[14] *N.L.R.B.* v. *M & B Contracting Corp,* on petition for civil contempt of the notice-posting, costs, and record production provisions of the judgment of the July 30, 1981, in No. 80-1077 (6th Cir.); *N.L.R.B.* v. *Pignotti Sheet Metal,* on motions for costs and for writ of body attachment for violation of the contempt adjudication of May 12, 1982, requiring posting of notices, No. 81-2033 (8th Cir.).

[15] *N.L.R.B.* v. *William Hopkins, d/b/a Electric Motor Service Co.,* on petition for civil contempt of the backpay provisions of the judgment of October 5, 1981, in No. 80-1282 (4th Cir.).

[16] *N.L.R.B.* v. *Lee Simmons and Beverly McKinstry Simmons, a parthership d/b/a Elemdorf & Fort Richardson Barber Concessions,* on petition for civil contempt of the protective order of July 21, 1980, in No. 80-7181 (9th Cir.).

The 20 cases which were commenced prior to fiscal 1982 were disposed of during the period. In nine cases, civil contempt was adjudicated,[21] in one of which, in addition to adjudicating respondent in comtempt for a second time, the court assessed the prospective fine which had been imposed in the earlier adjudication.[22] Six were disposed of by orders calling for full compliance;[23] four were discon-

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[17] *N.L.R.B.* v. *Land Equipment & Equipment Service Rentals*, protective restraining order entered October 19, 1981, with respect to the judgment of June 29, 1981, in No. 80-7242 (9th Cir.).; *N.L.R.B.* v. *Sally Lyn Fashions*, protective restraining orders entered February 17, 1982, and October 20, 1981 (No. 81-1520) with respect to the judgments of January 3, 1979 in No. 78-2481 and October 1, 1980, in No. 80-2067 (3d Cir.); *N.L.R.B.* v. *Bernie Zieminski d/b/a United Boat Center & as Ski Boats & RV center, d/b/a United Boat Center; Hilltop RV & Boat Rentals, d/b/a United Boat Center; D & G Marine Repair; and Everett's Marine Repair*, protective restraining order entered March 16, 1982, with respect to the judgment of October 9, 1980, in No. 80-7426 (9th Cir.).

[18] *N.L.R.B.* v. *Argano Electric Corp.*, discovery order granted March 29, 1982, with respect to the judgment of April 21, 1981, in No. 80-4255 (2d Cir.); *N.L.R.B.* v. *Dawson Masonry*, discovery order of March 29, 1982, with respect to the judgment of June 25, 1981, in No.81-7407 (5th Cir.); *N.L.R.B.* v. *Local 394, Laborers Intl. Union of North America, AFL-CIO*, discovery order entered July 30, 1982, with respect to the judgment of June 8, 1981, in No. 80-1106 (D.C. Cir.); *N.L.R.B.* v. *Urban Laboratories*, discovery order entered September 21, 1982, with respect to the judgment of February 5, 1981 in Nos. 80-7095 and 80-7164, and August 11, 1981, in No. 81-7328 (9th Cir.).

[19] *N.L.R.B.* v. *SFS Painting & Drywall*, motion for discovery denied January 25, 1982, with respect to the judgment of January 13, 1981, in No. 80-7552 (9th Cir.); *N.L.R.B.* v. *Steinerfilm*, motion for discovery denied September 7, 1982, with respect to the judgment of February 5, 1982, in No. 81-1437 (1st Cir.).

[20] *N.L.R.B.* v. *William Hopkins, d/b/a Electric Motor Service Co.*, motion for discovery with respect to the backpay provisions of the judgment of October 5, 1981, in No. 80-1282 (4th Cir.).

[21] *N.L.R.B.* v. *Acme Wire Works*, by order of August 27, 1982, in civil contempt of the 8(a)(5) provisions of the judgment entered October 3, 1978, in No. 77-4149 (2d Cir.); *N.L.R.B.* v. *Betra Mfg. Co.*, by order of January 15, 1982, in civil contempt of the bargaining, union-access, and court costs provisions of the judgment entered September 11, 1980, in No. 79-7210 (9th Cir.); *N.L.R.B.* v. *Bldg. & Constr. Trades Council of Philadelphia and Vicinity, AFL-CIO*, by order of May 24, 1982 (No. 81-2485), in civil contempt of the secondary boycott provisions of the judgment entered November 28, 1980, in No. 80-2506, and of the judgment entered March 4, 1974, in No. 74-1143 (3d Cir.); *N.L.B.R.* v. *Lenign Lumber Co.*, by order of January 12, 1982 (Nos. 80-2345 and 80-2346), in civil contempt of the bargaining provisions of the judgment entered on May 16, 1978 (Nos. 77-2273 and 77-2076) (577 F.2d 727) and October 19, 1979 (Nos. 78-2380, *et al.*) (609 F.2d 500; 609 F.2d 502; 609 F.2d 503 (3d Cir.)); *N.L.R.B.* v. *Dist. 17, United Mine Workers of America*, by order of November 24, 1981, in civil contempt of the 8(b)(1)(A) provisions of the judgment entered November 4, 1980, in No. 80-1680 (4th Cir.); *N.L.R.B.* v. *Lodge 34, Intl. Assn. of Machinists & Aerospace Wkrs., AFL-CIO*, order of October 11, 1981, in civil contempt of the 8(b)(1)(A) provisions of the judgment entered October 4, 1980, in No. 80-2430 (7th Cir.); *N.L.R.B.* v. *Sally Lyn Fashions*, by order of September 7, 1982 (No. 81-1520), in civil contempt of the reinstatement, notice-posting, and record production provisions of the judgment entered January 3, 1979, in No. 78-2481, and the backpay provisions of the judgment entered October 1, 1980, in No. 80-2067 (3d Cir.); *N.L.R.B.* v. *Seven Motors, Ltd, d/b/a Mazda South*, by order of April 21, 1982, in civil contempt of the make-whole and notice-posting provisions of the judgment entered April 7, 1980, in No. 79-2080, and the make-whole provisions of the judgment entered May 7, 1981, in No. 81-1423 (8th Cir.).

[22] *N.L.R.B.* v. *Union de Tronquistas de Puerto Rico, Loc. 901, Afiliada a la Teamsters Jose Cadiz & Pablo Leon*, by order of May 27, 1982, adjudicating Local 901 and its representative, Jose Cadiz, in civil contempt of the picket line violence provisions of the judgment of February 15, 1972, and the contempt adjudications of February 23, 1976, and April 1, 1980, and the notice mailing, reading, and publishing provisions of the April 1, 1980, contempt adjudication and assessing $42,000 fine against Local 901, and imposing prospective per violation fines of $17,500 against Local 901 and $100 against Cadiz in No. 71-1371 (1st Cir.).

[23] *N.L.R.B.* v. *Abramson Chrysler-Plymouth*, by order of July 16, 1982, requiring bargaining and supplying of information pursuant to the judgments entered June 14, 1979, in No. 79-1324, and March 20, 1980, in No. 80-1223 (7th Cir.); *N.L.R.B.* v. *Ad Art*, by order of April 30, 1982, requiring full reinstatement without loss of seniority or other privileges pursuant to the judgment entered February 2, 1981, in No. 78-3371 (645 F.2d 669) (9th Cir.); *N.L.R.B.* v. *Craw & Son*, by order of August 27, 1982 (No. 80-2443), requiring payment of modified amount of backpay

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tinued upon full compliance;[24] and one case was dismissed on the merits.[25]

Two opinions issued during this fiscal period are noteworthy. In *Computer Sciences Corp.*[26] a case involving the obligation of a *Burns* [27] successor to bargain with the union certified to represent employees of the predecessor employer, the Court concluded that because the successorship question presented "highly factual and close issues" of continued unit appropriateness, the matter should be resolved in the first instance by the Board, given the Board's special expertise and discretion in making unit determinations. Notwithstanding the Court's power to determine the question ancillary to its enforcement of the underlying Board order, the Court deemed it "unwise for policy reasons to do so in this case." It observed, however, that where "the dispute over successorship liability is but a sham, this court may proceed via contempt proceedings." Accordingly, it dismissed the contempt petition without prejudice to further proceedings before the Board.

In *Sally Lyn Fashions,*[28] the Court accepted the report of the special master in which he rejected the respondents' claimed inability to comply with the judgment. In order to meet their burden on this affirmative defense, the master held that the respondents must show "categorically and in detail" that "at no time since the entry of the judgment were they capable of satisfying any part of the

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pursuant to the judgment entered May 9, 1980 (No. 79-2498) (3d Cir.); *N.L.R.B.* v. *Geriatric Center of St. Louis, as successor to Health Enterprises of America, d/b/a Carlson Tower Geriatric Center & Rudy Nail,* by order of August 12, 1982, requiring, *inter alia,* the successor employer to execute and honor the collective-bargaining agreement of the predecessor employer in compliance with the judgment against the predecessor of July 28, 1981, in No. 81-1632 (8th Cir.); *N.L.R.B.* v. *Koval Press, Inc. and William Kopper,* by order of March 18, 1982, imposing prospective compliance fine of $1,000 and daily fine of $100 with respect to the bargaining provisions of the judgment of May 27, 1980, in No. 81-2057 (3d Cir.); *N.L.R.B.* v. *Bernie Zieminski d/b/a United Boat Center & as Ski Boats & RV Center d/b/a United Boat Center; Hilltop RV & Boat Rentals, d/b/a United Boat Center; D & G Marine Repair Inc. & Everett's Marine,* by order of June 30, 1982, upon compliance with the reinstatement and make-whole provisions of the judgment of October 9, 1980, in No. 80-7426 (9th Cir.).

[24] *N.L.R.B.* v. *Fry Foods,* by order of January 28, 1982, granting Board's motion to withdraw request for institution of criminal contempt proceedings upon respondent's compliance with consent order entered September 30, 1981, and with judgment entered November 13, 1979 (609 F. 2d 267), in No. 79-1210 (6th Cir.); *N.L.R.B.* v. *Ronald A. Hintz & Lenore Hintz, a Partnership, d/b/a Hintz's Restaurant & Lounge,* by order of December 16, 1981, granting Board's motion to withdraw contempt petition without prejudice upon respondent's compliance with the judgment entered July 25, 1980, in No. 80-1490 (8th Cir.); *N.L.R.B.* v. *Rabco Metal Products,* by order of April 20, 1982, granting Board's motion to discontinue contempt proceedings, without prejudice, upon execution of collective-bargaining agreement, in compliance with the contempt adjudication entered on September 4, 1979, respecting the bargining provisions of the judgment of February 17, 1978, in Nos. 76-1304 and 76-3132 (9th Cir.); *N.L.R.B.* v. *Howard Style Shops,* by order of March 17, 1982, granting Board's motion to dismiss contempt proceedings without prejudice upon compliance with the judgment entered October 1, 1980, in No. 80-2181 (7th Cir.).

[25] *Computer Sciences Corp., as successor to Federal Electric Corp.* v. *N.L.R.B.,* by order of January 4, 1982 (677 F.2d 804), dismissing comtempt petition respecting the bargaining provisions of the judgment of October 21, 1976 (539 F.2d 1043), in No. 76-1966 (11th Cir.).

[26] *Computer Sciences Corp., as successor to Federal Electric Corp.* v. *N.L.R.B.,* 677 F. 2d 804 (11th Cir., June 4, 1982).

[27] *N.L.R.B.* v. *Burns Intl. Security Services,* 406 U.S. 272 (1972).

[28] *N.L.R.B.* v. *Sally Lyn Fashions,* by order of August 10, 1982, in No. 81-1520, adopting the report of Special Master Raymond J. Durkin, United States Magistrate, issued July 23, 1982, recommending adjudication in civil contempt of the judgments of January 3, 1979, in No. 78-2481 and October 1, 1980, in No. 80-2067.

decree, and that the sum of their present resources of all kinds is insufficient to even partially satisfy the judgment." He noted further that the fact that a respondent may not hold property in his own name does not establish financial inability "since it does not exclude the probability that he could hold property jointly with others including his wife." Nor would "financial hardship" caused by the order excuse noncompliance, since respondents "must demonstrate that satisfaction of the judgments would be impossible even if all of their property were sold or mortgaged."

X

Special Litigation

A. Litigation Involving the Board's Jurisdiction

The Fourth Circuit in *In re Charles K. Sewell*[1] found that the Board and Charles K. Sewell were entitled to a writ of mandamus requiring the district court to dismiss a suit on preemption grounds. The court of appeals had previously reversed the district court on its refusal to permit the Board to intervene in the suit.[2] Thereafter, the Board joined the defendant on its request for a writ of mandamus. In the district court, a union sued the defendant, the president of an employer charged with a violation of section 8(a)(5), for refusing to bargain with the union. The company president was sued by the union in his individual capacity for interfering with the contractual relations between the company and the union and for acting with malice in preventing the union and the company from bargaining. The union sought compensatory and punitive damages. In finding that a writ should issue, the court of appeals found that the union's suit posed a direct interference with the court's jurisdiction by requiring corporate officials to defend against tort claims because of their decision to challenge Board certifications. The court held that mandamus was appropriate because appellate review of the district court order was inadequate in light of infringement on the Board's primary jurisdiction and the court's own jurisdiction to review Board orders.

The Board was involved in two cases brought under section 301 (29 U.S.C. § 185) for enforcement of collective-bargaining agreements, where courts held that the cases should be dismissed because of the Board's primary jurisdiction over the matters at issue.

In *Loc. 204, Intl. Brothd. of Electrical Wkrs.* v. *Iowa Electric Light & Power Co.*,[3] the court of appeals, following briefing, argument, and postargument memoranda by parties to the action, asked the Board for an amicus brief on the specific issue of the district court's jurisdiction under section 301 to decide and/or review an issue previously decided by the Board in a representation proceeding. Prior to this time the Board was unaware of the collateral litigation—in which the company and union had agreed, pursuant to their collective-bargaining contract, to have the Board determine whether a residual group of workers wanted union representation. If a majority of the employees voted for the union, the parties' contract then required bargaining and interest arbitration if no agreement could be reached regarding terms and conditions of employment.

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[1] 690 F.2d 403.

[2] Unpublished order, dated March 1, 1982.

[3] 668 F. 2d 413 (8th Cir.).

Throughout the Board's representation proceeding the company contended that the group of workers involved, quality control inspectors, were managerial employees or supervisors not entitled to union representation. The Board (3–2) ultimately held the workers were not managers or supervisors and remanded for an election. The company's challenges to the quality control inspectors' ballots were overruled by the Board and the union was certified as the bargaining representative.

Thereafter the union demanded bargaining pursuant to the contract but the employer refused maintaining that the quality control inspector position was managerial or supervisory and, therefore, not appropriate for a bargaining unit. When the union proceeded through the grievance procedures of the contract, the company continued to refuse to discuss the matter on these grounds. Finally, pursuant to an article of the collective-bargaining agreement, the union notified the company that it deemed its proposed contract modifications to have been accepted. When the company refused to meet the union's pay demands, the union filed suit for breach of the collective-bargaining agreement under section 301 of the Act. Shortly thereafter the union filed and then withdrew an 8(a)(5) charge with the region.

The district court [4] recognized that there was a question as to whether its jurisdiction was properly invoked in such a case, but concluded that it had jurisdiction under section 301 because the union's complaint alleged a breech of the agreement by the company in engaging in activity to defeat or evade the terms of the agreement. The court granted the union's motion for summary judgment on the grounds that there was substantial evidence on the administrative record to support the Board's decision that quality control inspectors were "employees." Consequently, the court entered a judgment against Iowa Electric for $23,400 in damages.[5] On appeal, the Eighth Circuit found that the suit was one actually to obtain review of the Board's factual finding on a representational issue, bypassing the review procedures in section 10 of the Act. The court noted that Board unfair labor practice jurisdiction over an activity does not necessarily preclude district court jurisdiction under section 301 if that same activity also constitutes a violation of a collective-bargaining agreement. However, representation matters are generally within the Board's primary, if not exclusive, jurisdiction. The court concluded that, regardless of whether the Board's jurisdiction was exclusive or primary, the district court was without jurisdiction over an issue that clearly was one of representation, since jurisdiction in the section 301 suit would lead to avoidance of the statutory review procedures in the Act.

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[4] 497 F.Supp. 873, 875 (D.C. Iowa 1980).

[5] In district court the company argued that the court ought to review and overrule the Board's decision or decide the issue *de novo*, while the union argued that the company was collaterally estopped from attacking or relitigating the Board's decision.

In the second case, *Alabama By-Products Corp.* v. *Local 1288, United Mine Wkrs. and N.L.R.B.,*[6] the employer brought suit to enforce a private settlement agreement with an employee who was threatened with discharge for remarks made during a grievance meeting. The employer offered the employee a 20-day suspension, in lieu of discharge, if he would agree to resign as union grievance committeeman and refrain from holding any union office other than recording secretary. Rather then force discharge, the employee agreed to the employer's conditions. Subsequently the union that represented the employee filed unfair labor practice charges with the Board, contending that the employee's suspension for conduct incidential to his grievance handling activity and the agreement extracted from the employee violated the Act. In dismissing the employer's suit based on the private settlement, the court found that to enforce the agreement would require it to determine the same issues then pending before the Board. Further, the court considered that the employer would have ample opportunity before the Board and the court of appeals to argue that the agreement should be deferred to by the Board. Finally, the court concluded that the Board had exclusive primary jurisdiction over the matters before the court and to avoid any potential conflict with the Board, dismissed the action.

In *N.Y. Racing Assn.* v. *N.L.R.B.,*[7] the Association (NYRA) sought review of the Board's refusal to repeal or amend its horseracing and dogracing rule—29 CFR 103.3 (1980)—and to process a representation petition. The district court held that it had *Leedom* v. *Kyne*[8] jurisdiction to review the Board's refusal to amend or repeal its rule because the employer had a statutory right under section 9(c)(1) to an investigation of its representation petition, and because section 14(c)(1) requires that the Board may only refuse to exercise jurisdiction over an entire industry if it has arrived at a reasoned opinion that no labor dispute involving that industry will sufficiently impact interstate commerce to warrant Board jurisdiction. Absent such an opinion, which the district court concluded the Board had failed to present, the Board may not lawfully promulgate a rule refusing jurisdiction over an entire industry. On the basis of *de novo* evidence presented to the district court by NYRA, the court found that there was "[a]mple evidence of the overwhelming impact of the horseracing industry on commerce, and the substantial impact of [NYRA's] business [on interstate commerce]." Accordingly, the district court concluded that the Board had abused its discretion by failing to conduct an appropriate inquiry into the volume of commerce affected by potential labor disputes in the horseracing industry at the time it promulgated its rule and when it denied NYRA's representation petition. The court remanded the Board's proceedings for reconsideration in light of its findings.

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[6] 109 LRRM 2427, 95 LC ¶13,836.
[7] 110 LRRM 3177 (D.C. N.Y., July 28, 1982) (29–RM–635).
[8] 358 U.S. 184 (1958).

B. Litigation Involving Suits to Enjoin the Board

In *Johanna Maurice* v. *N.L.R.B.*, the Fourth Circuit [9] upheld the Board's procedure for challenging subpoenas served by the General Counsel. Counsel for the General Counsel served a *subpoena ad testificandum* to a newspaper reporter to gain testimony to a conversation the reporter had with the president of a company that had closed a mine allegedly for discriminatory reasons. The reporter had previously written a published newspaper article about the mine's closing, naming the president as her source. Upon receiving the subpeona, the reporter filed for a temporary injunction in district court arguing that enforcement of the subpoena would cause a "chilling effect" upon her first amendment right to report the news. The reporter did not exhaust any of the Board's administrative remedies for challenging such subpoenas under section 11 of the Act, 29 U.S.C. § 161. Nor did the reporter wait for the General Counsel to file for enforcement of its subpoena before commencing her action in district court. The district court [10] granted the reporter's request, holding that the Board's administrative procedure could not adequately resolve the first amendment issue and that the reporter's constitutional rights would be harmed if the subpoena were enforced.

Upon appeal, the Board argued before the Fourth Circuit that the district court had no jurisdiction to hear the dispute since the reporter had not exhausted the administrative remedies for challenging such subpoenas and that these remedies were adequate to resolve the constitutional issue. The Board additionally argued that the reporter did not have a constitutional right not to testify where the reporter had already published her article and named the source. The Fourth Circuit, in a 2-1 decision, agreed with the Board and vacated the temporary injunction. The court reasoned, without reaching the underlying constitutional issues, that since the reporter "has not shown that she would be irreparably injured by the requirement to exhaust available administrative remedies before seeking judicial relief" and "can make any defense to the subpoena . . . that she could make in the district court," the district court erred in granting the temporary injunction.[11]

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[9] 691 F.2d 182.

[10] 108 LRRM 2882, 2883 (D.C. W.Va.).

In *Gary Concrete Products* v. *N.L.R.B.*,[12] the company obtained from the district court, *ex exparte*, a temporary order restraining the Board from conducting an unfair labor practice hearing on a refusal-to-bargain complaint until the company could obtain documents, pursuant to a Freedom of Information Act request, explaining the General Counsel's decision to issue the complaint. The Eleventh Circuit, however, issued a writ of mandamus vacating the temporary restraining order and directing the district court not to conduct any further proceedings on the company's complaint for injunctive relief.[13] Noting that the district court lacked subject matter jurisdiction to review either unfair labor practice hearings or the General Counsel's decision to issue an unfair labor practice complaint and that "any party aggrieved by Board rulings during the course of [unfair labor practice] proceedings may seek review in the court of appeals following a final Board order," the court concluded that the company had "completely failed to demonstrate any basis for the district court's exercise of jurisdiction."

C. Litigation Involving Preemption

In *People of State of Ill., ex rel. John A. Barra* v. *Archer Daniels Midland Co. & N.L.R.B.*,[14] the District Court for the Central District of Illinois held that the National Labor Relations Act preempted an Illinois statute imposing criminal sanctions against professional strikebreakers who offer to take the place of employees involved in a strike or lockout and employers who knowingly employ professional strikebreakers. The Illinois statute defined a professional strike-breaker as "any person who repeatedly and habitually offers himself for employment on a temporary basis where a lockout or strike exists to take the place of an employee whose work has ceased as a direct consequence of such lockout or strike."

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[11] *Id.*

[12] No. CV 182-033 (S.D. Ga. Feb. 28, 1982).

[13] *In re N.L.R.B. (Gary Concrete Products)*, 109 LRRM 3203 (11th Cir. Mar. 2, 1982).

[14] 110 LRRM 3320.

The court found the statute preempted on the ground that it limited employers' ability to hire replacements for striking employees and thereby upset the balance of power between employers and unions created by Congress when it selected certain economic weapons for regulation and left others to be regulated by the free play of economic forces.

D. Litigation Involving the Freedom of Information Act

In *Alirez* v. *N.L.R.B.*,[15] the Tenth Circuit held that statements obtained from employees during an unfair labor practice investigation were exempt from disclosure under exemption 7(C) even though the unfair labor practice case was closed and no further proceedings were contemplated. Based on the Tenth Circuit's earlier decisions in *Poss* v. *N.L.R.B.*,[16] the district court [17] had ordered disclosure of the witness statements but had allowed deletion of the names, addresses, and telephone numbers of the sources. The Tenth Circuit found that the district court misconstrued *Poss* and erred by failing to weigh, under exemption 7(C), the invasion of privacy resulting from disclosure of the requested documents against the public interest which would be served by disclosure. Based on certain conclusions of the district court, the Tenth Circuit performed the balancing analysis required by exemption 7(C). The court concluded that disclosure "would result in serious invasions of privacy" by "potentially subjecting Board informants and others to embarrassment or reprisals from Mr. Alirez [the requestor] and their employer." [18] The court further concluded that disclosure would serve private interests only and the public impact from disclosure would be "very limited." [19] Finally, the court concluded that there was no way to provide access to the substance of the statements without revealing the identity of the sources. This conclusion was based on the fact that the statements related to a limited number of people. As a result, the identity of the source of the statement might be readily identified by someone with specific knowledge of the incidents. Accordingly, the court concluded that the statements were exempt in their entirety.

In *Anthony Cantino* v. *N.L.R.B.*,[20] plaintiff brought suit under the Freedom of Information Act, 5 U.S.C. § 552, seeking the disclosure of memoranda, written statements, and witnesses' affidavits compiled by the Board in the course of investigating unfair labor practice charges brought by Cantino, which charges were ultimately dismissed. After institution of the district court suit, the Board voluntarily submitted certain documents to Cantino, the 6-month period after closure of the case having expired on June 30, 1981. The Board then moved to dismiss the suit. Cantino opposed the Board's motion and sought attorneys fees and costs under 5 U.S.C. § 552(a)(4)(E). Although the court determined that Cantino had prevailed substantially in his action against the Board and, therefore, was eligible for an award of fees, the court further determined that attorneys fees were not warranted because (a) no public benefit was served by plaintiff's action, but only a private one; and (b) because the Board had a reasonable basis in law for its exemption 7 claim, 5 U.S.C. § 552(b)(7), regarding witnesses' statements and affidavits.[21] Concluding that an award of attorneys fees in the instant case would "not further the policy goals of the FOIA and would incorrectly place the burden on the taxpayers to pay for Cantino's private interests," the court granted the Board's motion to dismiss as moot.

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[15] 676 F.2d 423.

[16] 565 F.2d 654.

[17] Unpublished opinion; Civil Action No. 79-2-1243 (D.C. Colo., Feb. 26, 1980).

[18] 676 F.2d at 427.

[19] 676 F.2d at 427.

[20] 109 LRRM 3205 (D.C. Mass., Mar. 18, 1982).

E. Litigation Under the Bankruptcy Code and the Bankruptcy Act

In *Adams Delivery Service,*[22] the Bankruptcy Appellate Panel of the Ninth Circuit reversed the bankruptcy court[23] which had refused to remand to the Board—subsequent to a removal action filed by the debtor—a backpay liquidation proceeding involving an unlawfully discharged employee. The appellate panel found, first, that the Board's appeal from the bankruptcy court's refusal to remand was properly before it since the Board was challenging the bankruptcy court's assumption of jurisdiction over a Board proceeding as being beyond the court's authority, and not the determination of the bankruptcy court on the remand which is discretionary. Second, the panel concluded that the NLRB proceedings may not be removed to bankruptcy court. The panel agreed with Collier (1 Collier on Bankruptcy (15th ed.) par. 3:01 at 3-71) that the term "civil proceeding" as used in the bankruptcy removal statute, 28 U.S.C. § 1441, does not encompass a proceeding before the Board, or other administrative agency. The panel further found that, because with respect to backpay proceedings, the Board is not acting as a court, and because the concept of a "civil action" is inseparable from a court proceeding, the removal provisions of section 1478 do not apply to Board proceedings, but, rather, Board proceedings fall within the exception to removal as provided in section 1478(a). The panel also noted the similarity of language in section 1478(a) and that in the automatic stay provision in section 362(b)(4), and concluded that, as found by the Fifth Circuit in *N.L.R.B.* v. *Evans Plumbing Co.,* 639 F.2d 291 (1981), and as suggested by the Ninth Circuit in its pre-Code decision *In re Bel Air Chateau Hospital,* 611 F.2d 1248 (1979), the automatic stay provision of section 362(b)(4) does not apply to NLRB proceedings because of the "police and regulatory" exception set forth in that section.

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[21] The Board also claimed exemption 5, 5 U.S.C. § 552(b)(5), with regard to intra-agency memoranda on the ground that they were predecisional memoranda prepared in order to assist the Board in arriving at its decision. The court agreed that the Board had a reasonable basis in law for its claim regarding predecisional memoranda, but that its refusal and delayed disclosure of memoranda containing factual judgments constituted a needless denial of information and was, therefore a "somewhat unreasonable" exemption 5 claim.

[22] 9 BCD 1144 (BAP, 9th Cir.).

[23] U.S. Bankruptcy Court, N.D. Cal., No. 481-0266-H and 481-0643-AW, decided Nov. 12, 1981.

The Board intervened in a bankruptcy proceeding on appeal [24] to argue that the Second Circuit's standard for rejection of collective-bargaining agreements [25] should be adopted by the Third Circuit. The Third Circuit determined that an employer in reorganization proceedings under Chapter 11 of the Bankruptcy Code should be allowed to reject a collective-bargaining agreement with the union representing its employees only after "thorough scrutiny, and a careful balancing of the equities on both sides." 682 F.2d at 79, quoting *Kevin Steel,* 519 F.2d at 707. The Third Circuit, however, rejected the full panoply of the Second Circuit's standard for rejection, thereby refusing to require that rejection be permitted "only where it clearly appears to be the lesser of two evils and that, unless the agreement is rejected, the [employer] will collapse and the employees will no longer have their jobs." 682 F.2d at 79, quoting *REA Express,* 523 F.2d at 172. Explaining further its standard for rejection, the Third Circuit concluded that the bankruptcy court must make a reasoned determination that rejection of the labor agreement will assist the employer in achieving a satisfactory reorganization. In the related enforcement proceeding that was consolidated with the appeal from the bankruptcy court, the court rejected the Board's use of summary judgment proceedings against the employer, finding that its involvement in bankruptcy proceedings and the drastic circumstances surrounding it excused the employer's untimely answer to the Board's unfair labor practice complaint. On remand, the court instructed the Board to separate pre- and post-bankruptcy petition unfair labor practices, and that, if the bankruptcy court permitted rejection of the contract, the Board would be bound by the bankruptcy court's order and precluded from finding postpetition unfair labor practices as a result of the rejected contract.

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[24] *In re Bildisco,* 682 F.2d 72 (3d Cir.), petition for cert. pending, No. 82.

[25] See *Shopmen's Loc. 455* v. *Kevin Steel Products,* 519 F.2d 698 (2d Cir. 1975); *Broth. of Railway, Airline and Steamship Clerks* v. *REA Express,* 523 F.2d 164 (2d Cir. 1975), cert. denied 423 U.S. 1017.

In the Matter of Miles Machinery Co.,[26] the Board intervened in a bankruptcy proceeding wherein the debtor sought to reject its collective-bargaining agreement with the union. Tracing the history of the rejection of such executory agreements through *Shopmen's Local 455* v. *Kevin Steel Products,* 519 F.2d 698 (2d Cir. 1975); *Broth. of Railway, Airline and Steamship Clerks* v. *REA Express,* 523 F.2d 164 (2d Cir. 1975), cert. denied 423 U.S. 1017, and *Truck Drivers Loc. 807* v. *Bohack Corp.,* 541 F.2d 312 (2d Cir. 1976), affd. on remand 567 F.2d 237 (2d Cir. 1977), cert. denied 439 U.S. 825, the bankruptcy court relied on the *Allied Supermarkets,* 6 BR 968 (ED Mich. 1980), decision which concluded that a labor contract was onerous and burdensome only when the debtor's survival was obfuscated. On the basis of the evidence presented by the debtor, the court concluded that factors unrelated to labor costs were keyed to the debtor's survival and that the debtor had failed to establish by a preponderance of the evidence that the collective-bargaining agreement was so onerous and burdensome that the debtor was doomed to fail, absent rejection.

In another bankruptcy case, *In re Tucson Yellow Cab Co.,*[27] the bankruptcy court for the district of Arizona granted, in part, the request of the debtor in possession to enjoin the unfair labor practice proceeding which was then pending against the debtor. The bankruptcy court found that the Supreme Court's decision in *Nathanson* v. *N.L.R.B.,* 344 U.S. 25 (1982), had been effectively overruled by Congress' enactment of the Bankruptcy Act of 1978,[28] which, among other things, established the new bankruptcy court system and provided those courts, under 28 U.S.C. § 1471, with "original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.[29] The bankruptcy court held that section 1471 provided it with jurisdiction to determine both the merits of pending unfair labor practice proceedings and the issue of appropriate remedial relief. Based upon that conclusion, and finding further that there existed a potential for a Board remedial order to consume, and in the court's view "threaten," the assets of the debtor's estate, the bankruptcy court decided to enjoin the Board from proceeding any further than to determine whether or not the debtor, Tucson Yellow Cab, had engaged in unfair labor practice conduct.

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[26] U.S. Bankruptcy Court, Eastern Div. of Mich., Northern Div., No. 81-00388, decided June 17, 1982.

[27] 112 LRRM 2705, 21 B.R. 166 (B.C. D. Ariz.).

[28] Public Law 95-598, 92 Stat. 2549, U.S. Code Cong. and Admin. News (1978), p. 5787.

[29] On June 28, 1982, the Supreme Court declared that sec. 1471 of title 28 of the U.S. Code was unconstitutional. *Northern Pipeline Constr. Co.* v. *Marathon Pipeline Co.*, 102 S.Ct. 2858. However, sec. 1471 remained effective by successive stays of the Court's mandate until December 24, 1982. See 102 S.Ct. 2880, 103 S.Ct. 199, 200.

In *N.L.R.B.* v. *Jose Gonzalez,* the district court [30] rejected a debtor's attempt to gain a discharge under the Bankruptcy Act [31] from backpay liability owed discriminatees under a consent judgment entered against the debtor for violating the National Labor Relations Act. The debtor had successfully argued before the bankruptcy court that the Board had failed to present a *prima facie* case that an *alter ego* company was still operating or that certain transfers paid an employee were "fraudulent" within the meaning of 11 U.S.C. § 727(a)(2). Upon appeal, the district court reversed the bankruptcy court and remanded the case for trial. The district court held that "we can find no basis to support the finding that in giving away a substantial sum of money just before filing his petition in the bankruptcy, the bankrupt—who never attempted to comply with the judgment of the Court of Appeals—did not act with intent at least to 'hinder' his creditors within the meaning of the statute." [32] The district court continued that "[t]he statutory requirement that there be actual intent to hinder or defraud cannot be construed to give debtors license simply to ignor judgments validly entered against them." [33] Upon remand, the bankruptcy court denied the debtor a discharge.

F. Litigation Involving the Equal Access to Justice Act

In *Stanley Spencer* v. *N.L.R.B.,* [34] the district court declined to award attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(a), to plaintiffs even though they were "prevailing parties." Plaintiffs in district court were a group of qualified engineers seeking review of two Board rulings dismissing a decertification petition and a unit clarification petition. As relief, plaintiffs requested (1) a declaratory judgment that they were "professional employees" within the meaning of section 2(12) of the Act and (2) an injunction compelling the Board either to hold a decertification election among the engineers in the companywide unit or to determine whether they were "professional employees" and thus entitled to vote for or against inclusion in a mixed unit under section 9(b)(1) of the Act. The Board moved for dismissal or summary judgment on the grounds that Board representation proceedings are only reviewable in district court if the Board has contravened an express statutory mandate and that the Board had not done so.

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[30] 109 LRRM 3156 (D.C.N.Y.).

[31] 11 U.S.C. § 727.

[32] 109 LRRM at 3157.

[33] *Ibid.*

[34] 548 F. Supp. 256 (D.C.D.C.).

Thereafter, in response to another decertification petition, the Board reconsidered the "unique situation" and ordered the requested election (258 NLRB 1059). The Board then moved for dismissal of the district court action as moot. The district court, upon granting the Board's motion to dismiss, found that, although plaintiffs "did not secure a favorable decision on the merits of their central legal contention that the Board's denial of their initial decertification petition violated a clear, controlling, and specific provision of the NLRA, they were ultimately successful in obtaining all of the relief that they had sought in a judicial forum." The district court further found "[e]ven if there was no causal nexus whatsoever between the actions of the Board and the prosecution of this lawsuit by the plaintiffs . . . the Board's intervening decision to effectively moot this action by granting plaintiffs the relief that they had requested and the virtually voluntary dismissal that has followed warrant the conclusion that plaintiffs are 'prevailing parties' under 28 U.S.C. Sec. 2412(a)" and are therefore entitled to reasonable costs. The court further found, however, that there was a reasonable basis in law and fact for the Board's position in both the district court litigation and in the underlying administrative proceeding and, accordingly, plaintiffs were not entitled to attorneys' fees.

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APPENDIX

GLOSSARY OF TERMS USED IN STATISTICAL TABLES

The definitions of terms contained in this glossary are not intended for general application but are specifically directed toward increasing comprehension of the statistical tables that follow. Thus the definitions are keyed directly to the terms used in such tables.

Adjusted Cases

Cases are closed as "adjusted" when an informal settlement agreement is executed and compliance with its terms is secured. (See "Informal Agreement," this glossary.) In some instances, a written agreement is not secured but appropriate remedial action is taken so as to render further proceeding unnecessary. A central element in an "adjusted" case is the agreement of the parties to settle differences without recourse to litigation.

Advisory Opinion Cases

See "Other Cases—AO" under "Types of Cases."

Agreement of Parties

See "Informal Agreement" and "Formal Agreement," this glossary. The term "agreement" includes both types.

Amendment of Certification Cases

See "Other Cases—AC" under "Types of Cases."

Backpay

Amounts of money paid or to be paid employees as reimbursement for wages lost because they were discriminatorily discharged or unlawfully denied employment, plus interest on such money. Also included is payment for bonuses, vacations, other fringe benefits, etc., lost because of the discriminatory acts, as well as interest thereon. All moneys noted in table 4 have been reported as paid or owing in cases closed during the fiscal year. (Installment payments may protract some payments beyond this year and some payments may have actually been made at times considerably in advance of the date a case was closed; i.e., in a prior fiscal year.)

Backpay Hearing

A supplementary hearing to receive evidence and testimony as to the amount of backpay due discriminatees under a prior Board or court decree.

Backpay Specification

The formal document, a "pleading," which is served on the parties when the regional director and the respondent are unable to agree as to the amounts of backpay due discriminatees pursuant to a Board order or court decree requiring payment of such backpay. It sets forth in detail the amount held by the regional director to be owing each discriminatee and the method of computation employed. The specification is accompanied by a notice of hearing setting a date for a backpay hearing.

Case

A "case" is the general term used in referring to a charge or petition filed with the Board. Each case is numbered and carries a letter designation indicating the type of case. See "Types of Cases."

Certification

A certification of the results of an election is issued by the regional director or the Board. If a union has been designated as the exclusive bergaining representative by a majority of the employees, a certification of representative is issued. If no union has received a majority vote, a certification of results of election is issued.

Challenges

The parties to an NLRB election are entitled to challenge any voter. At the election site, the challenged ballots are segregated and not counted when other ballots are tallied. Most frequently, the tally of unchallenged ballots determines the election and the challenged ballots are insufficient in number to affect the results of the election. The challenges in such a case are never resolved, and the certification is based on the tally of (unchallenged) ballots.

When challenged ballots are determinative of the result, a determination as to whether or not they are to be counted rests with the regional director in the first instance, subject to possible appeal to the Board. Often, however, the "determinative" challenges are resolved informally by the parties by mutual agreement. No record is kept of nondeterminative challenges or determinative challenges which are resolved by agreement prior to issuance of the first tally of ballots.

Charge

A document filed by an employee, an employer, a union, or an individual alleging that an unfair labor practice has been committed. See "C Case" under "Types of Cases."

Complaint

The document which initiates "formal" proceedings in an unfair labor practice case. It is issued by the regional director when he or she concludes on the basis of a completed investigation that any of the allegations contained in the charge have merit and adjustment or settlement has not been achieved by the parties. The complaint sets forth all allegations and information necessary to bring a case to hearing before an administrative law judge pursuant to due process of law. The complaint contains a notice of hearing, specifying the time and place of hearing.

Election, Runoff

An election conducted by the regional director after an initial election, having three or more choices on the ballot, has turned out to be inconclusive (none of the choices receiving a majority of the valid votes cast). The regional director conducts the runoff election between the choices on the original ballot which received the highest and the next highest number of votes.

Election, Stipulated

An election held by the regional director pursuant to an agreement signed by all the parties concerned. The agreement provides for the waiving of hearing and the establishment of the appropriate unit by mutual consent. Postelection rulings are made by the Board.

Eligible Voters

Employees within an appropriate bargaining unit who were employed as of a fixed date prior to an election, or are otherwise qualified to vote under the Board's eligibility rules.

Fees, Dues, and Fines

The collection by a union or an employer of dues, fines, and referral fees from employees may be found to be an unfair labor practice under section 8(b)(1)(A) or (2) or 8(a)(1) and (2) or (3), where, for instance such moneys were collected pursuant to an illegal hiring hall arrangement, or an invalid or unlawfully applied union-security agreement; where dues were deducted from employees' pay without their authorization; or, in the case of fines, where such fines restrained or coerced employees in the exercise of their rights. The remedy for such unfair labor practices usually requires the reimbursement of such moneys to the employees.

Fines

See "Fees, Dues, and Fines."

Formal Action

Formal actions may be documents issued or proceedings conducted when the voluntary agreement of all parties regarding the disposition of all issues in a case cannot be obtained, and where dismissal of the charge or petition is not warranted. Formal actions, are, further, those in which the decision-making authority of the Board (the regional director in representation cases), as provided in sections 9 and 10 of the Act, must be exercised in order to achieve the disposition of a case or the resolution of any issue raised in a case. Thus, formal action takes place when a Board decision and consent order is issued pursuant to a stipulation, even though the stipulation constitutes a voluntary agreement.

Formal Agreement (in unfair labor practice cases)

A written agreement between the Board and the other parties to a case in which hearing is waived and the specific terms of a Board order agreed upon. The agreement may also provide for the entry of a consent court decree enforcing the Board order.

Compliance

The carrying out of remedial action as agreed upon by the parties in writing (see "Formal Agreement," "Informal Agreement"); as recommended by the administrative law judge in the decision; as ordered by the Board in its decision and order; or decreed by the court.

Dismissed Cases

Cases may be dismissed at any stage. They are dismissed informally when, following investigation, the regional director concludes that there has been no violation of the law, that there is insufficient evidence to support further action, or for a variety of other reasons. Before the charge is dismissed, however, the charging party is given the opportunity to withdraw the charge by the administrative law judge, by the Board, or by the courts through their refusal to enforce orders of the Board.

Dues

See "Fees, Dues, and Fines."

Election, Consent

An election conducted by the regional director pursuant to an agreement signed by all parties concerned. The agreement provides for the waiving of a hearing, the establishment of the appropriate unit by mutual consent, and the final determination of all postelection issues by the regional director.

Election, Directed

Board-Directed

An election conducted by the regional director pursuant to a decision and direction of election by the Board. Postelection rulings are made by the regional director or by the Board.

Regional Director-Directed

An election conducted by the regional director pursuant to a decision and direction of election issued by the regional director after a hearing. Postelection rulings are made by the regional director or by the Board.

Election, Expedited

An election conducted by the regional director pursuant to a petition filed within 30 days of the commencement of picketing in a situation in which a meritorious 8(b)(7)(C) charge has been filed. The election is conducted under priority conditions and without a hearing unless the regional director believes the proceeding raises questions which cannot be decided without a hearing.

Postelection rulings on objections and/or challenges are made by the regional director and are final and binding unless the Board grants an appeal on application by one of the parties.

Election, Rerun

An election held after an initial election has been set aside either by the regional director or by the Board.

Informal Agreement (in unfair labor practice cases)

A written agreement entered into between the party charged with committing an unfair labor practice, the regional director, and (in most cases) the charging party requiring the charged party to take certain specific remedial action as a basis for the closing of the case. Cases closed in this manner are included in "adjusted" cases.

Injunction Petitions

Petitions filed by the Board with respective U.S. district courts for injunctive relief under section 10(j) or section 10(e) of the Act pending hearing and adjudication of unfair labor practice charges before the Board. Also, petitions filed with the U.S. court of appeals under section 10(e) of the Act.

Jurisdictional Disputes

Controversies between unions or groupings of employees as to which employees will perform specific work. Cases involving jurisdictional disputes are received by the Board through the filing of charges alleging a violation of section 8(b)(4)(D). They are initially processed under section 10(k) of the Act which is concerned with the determination of the jurisdictional dispute itself rather than with a finding as to whether an unfair labor practice has been committed. Therefore, the failure of a party to comply with the Board's determination of dispute is the basis for the issuance of an unfair labor practice complaint and the processing of the case through usual unfair labor practice procedures.

Objections

Any party to an election may file objections alleging that either the conduct of the election or the conduct of a party to the election failed to meet the Board's standards. An election will be set aside if eligible employee-voters have not been given an adequate opportunity to cast their ballots, in secrecy and without hindrance from fear or other interference with the expression of their free choice.

Petition

See "Representation Cases." Also see "Other Cases—AC, UC, and UD" under "Types of Cases."

Proceeding

One or more cases included in a single litigated action. A "proceeding" may be a combination of C and R cases consolidated for the purpose of hearing.

Representation Cases

This term applies to cases bearing the alphabetical designations RC, RM, or RD. (See "R Cases" under "Types of Cases," this glossary, for specific definitions of these terms.) All three types of cases are included in the term "representation" which deals generally with the problem of which union, if any, shall represent employees in negotiations with their employer. The cases are initiated by the filing of a petition by a union, an employer, or a group of employees.

Representation Election

An election by secret ballot conducted by the Board among the employees in an appropriate collective-bargaining unit to determine whether the employees wish to be represented by a particular labor organization for purposes of collective bargaining. The tables herein reflect only final elections which result in the issuance of a certification of representative if a union is chosen, or a certification of results if the majority has voted for "no union."

Situation

One or more unfair labor practice cases involving the same factual situation. These cases are processed as a single unit of work. A situation may include one or more CA cases, a combination of CA and CB cases, or combination of other types of C cases. It does not include representation cases.

Types of Cases

General: Letter designations are given to all cases depending upon the subsection of the Act allegedly violated or otherwise describing the general nature of each case. Each of the letter designations appearing below is descriptive of the case it is associated with.

C Cases (unfair labor practice cases)

A case number which contains the first letter designation C, in combination with another letter, i.e., CA, CB, etc., indicates that it involves a charge that an unfair labor practice has been committed in violation of one or more subsections of section 8.

CA: A charge that an employer has committed unfair labor practices in violation of section 8(a)(1), (2), (3), (4), or (5), or any combination thereof.

CB: A charge that a labor organization has committed unfair labor practices in violation of section 8(b)(1), (2), (3), (5), or (6), or any combination thereof.

CC: A charge that a labor organization has committed unfair labor practices in violation of section 8(b)(4)(i) and/or (A), (B), or (C), or any combination thereof.

CD: A charge that a labor organization has committed an unfair labor practice in violation of section 8(b)(4)(i) or (ii)(D). Preliminary actions under section 10(k) for the determination of jurisdictional disputes are processed as CD cases. (See "Jurisdictional Disputes" in this glossary.)

CE: A charge that either a labor organization or an employer, or both jointly, have committed an unfair labor practice in violation of section 8(e).

CG: A charge that a labor organization has committed unfair labor practices in violation of section 8(g).

CP: A charge that a labor organization has committed unfair labor practices in violation of section 8(b)(7)(A), (B), or (C), or any combination thereof.

R Cases (representation cases)

A case number which contains the first letter designation R, in combination with another letter, i.e., RC, RD, RM, indicates that it is a petition for investigation and determination of a question concerning representation of employees, filed under section 9(c) of the act.

RC: A petition filed by a labor organization or an employee alleging that a question concerning representation has arisen and seeking an election for determination of a collective-bargaining representative.

RD: A petition filed by employees alleging that the union previously certified or currently recognized by the employer as their collective-bargaining representative no longer represents a majority of the employees in the appropriate unit and seeking an election to determine this.

RM: A petition filed by an employer alleging that a question concerning representation has arisen and seeking an election for the determination of a collective-bargaining representative.

Other Cases

AC: (Amendment of Certification cases): A petition filed by a labor organization or an employer for amendment of an existing certification to reflect changed circumstances, such as changes in the name or affiliation of the labor organization involved or in the name or location of the employer involved.

AO: (Advisory Opinion cases): As distinguished from the other types of cases described above, which are filed in and processed by regional offices of the Board, AO or "advisory opinion" cases are filed directly with the Board in Washington and seek a determination as to whether the Board would or would not assert jurisdiction, in any given situation on the basis of its current standards over the party or parties to a proceeding pending before a state or territorial agency or a court. (See subpart H of the Board's Rules and Regulations, Series 8, as amended.)

UC: (Unit Clarification cases): A petition filed by a labor organization or an employer seeking a determination as to whether certain classification of employees should or should not be included within a presently existing bargaining unit.

UD: (Union Deauthorization case): A petition filed by employees pursuant to section 9(e)(1) requesting that the Board conduct a referendum to determine whether a union's authority to enter into a union-shop contract should be rescinded

UD Cases

See "Other Cases—UD" under "Types of Cases."

Unfair Labor Practice Cases

See "C Cases" under "Types of Cases."

Union Deauthorization Cases

See "Other Cases—UD" under "Types of Cases."

Union-Shop Agreement

An agreement between an employer and a labor organization which requires membership in the union as a condition of employment on or after the 30th day following (1) the beginning of such employment or (2) the effective date of the agreement, whichever is the later.

Unit, Appropriate Bargaining

A grouping of employees in a plant, firm, or industry recognized by the employer, agreed upon by the parties to a case, or designated by the Board or its regional director, as appropriate for the purposes of collective bargaining.

Valid Vote

A secret ballot on which the choice of the voter is clearly shown.

Withdrawn Cases

Cases are closed as "withdrawn" when the charging party or petitioner, for whatever reasons, requests withdrawal of the charge or the petition and such request is approved.

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Readers are encouraged to communicate with the Agency as to questions on the tables by writing to the Office of the Executive Secretary, National Labor Relations Board, 1717 Pennsylvania Avenue, NW., Washington, D.C. 20570.

Table 1.—Total Cases Received, Closed, and Pending, Fiscal Year 1982 [1]

	Total	Identification of filing party					
		AFL–CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
Pending October 1, 1981	*26,316	10,216	3,021	1,140	1,180	8,452	2,307
Received fiscal 1982	47,210	14,693	4,780	1,818	2,348	19,290	4,281
On docket fiscal 1982	73,526	24,909	7,801	2,958	3,528	27,742	6,588
Closed fiscal 1982	45,103	14,354	4,659	1,699	2,041	18,209	4,141
Pending September 30, 1982	28,423	10,555	3,142	1,259	1,487	9,533	2,447
	Unfair labor practice cases [2]						
Pending October 1, 1981	*21,852	8,134	2,183	908	855	7,824	1,948
Received fiscal 1982	38,097	11,451	3,220	1,324	1,658	17,016	3,428
On docket fiscal 1982	59,949	19,585	5,403	2,232	2,513	24,840	5,376
Closed fiscal 1982	36,424	11,078	3,028	1,216	1,409	16,293	3,400
Pending September 30, 1982	23,525	8,507	2,375	1,016	1,104	8,547	1,976
	Representation cases [3]						
Pending October 1, 1981	*4,130	1,969	820	229	297	523	292
Received fiscal 1982	8,276	3,008	1,521	468	614	1,958	707
On docket fiscal 1982	12,406	4,977	2,341	697	911	2,481	999
Closed fiscal 1982	7,952	3,070	1,595	458	569	1,646	614
Pending September 30, 1982	4,454	1,907	746	239	342	835	385
	Union-shop deauthorization cases						
Pending October 1, 1981	*101	...	...	...	...	101	...
Received fiscal 1982	305	...	...	...	...	305	...
On docket fiscal 1982	406	...	...	...	...	406	...
Closed fiscal 1982	259	...	...	...	...	259	...
Pending September 30, 1982	147	...	...	...	...	147	...
	Amendment of certification cases						
Pending October 1, 1981	*22	13	2	0	5	0	2
Received fiscal 1982	49	32	2	4	10	0	1
On docket fiscal 1982	71	45	4	4	15	0	3
Closed fiscal 1982	39	24	2	4	8	0	1
Pending September 30, 1982	32	21	2	0	7	0	2
	Unit clarification cases						
Pending October 1, 1981	*211	100	16	3	28	4	65
Received fiscal 1982	483	202	37	22	66	11	145
On docket fiscal 1982	694	302	53	25	89	15	210
Closed fiscal 1982	429	182	34	21	55	11	126
Pending September 30, 1982	265	120	19	4	34	4	84

[1] See Glossary for definitions of terms. Advisory Opinion (AO) cases not included. See table 22.

[2] See table 1A for totals by types of cases.

[3] See table 1B for totals by types of cases.

*Revised. Reflects higher figures than reported as pending September 30, 1981, in last year's Annual Report. Revised totals result from post-report adjustments to last year's "on docket" and/or "closed" figures.

Table 1A.—Unfair Labor Practice Cases Received, Closed, and Pending, Fiscal Year 1982 [1]

	Total	Identification of filing party					
		AFL-CIO unions	Team-sters	Other national unions	Other local unions	Individ-uals	Employ-ers
				CA cases			
Pending October 1, 1981	*17,693	8,023	2,172	904	783	5,771	40
Received fiscal 1982	27,749	11,220	3,176	1,290	1,475	10,570	18
On docket fiscal 1982	45,442	19,243	5,348	2,194	2,258	16,341	58
Closed fiscal 1982	26,581	10,869	2,984	1,193	1,249	10,254	32
Pending September 30, 1982	18,861	8,374	2,364	1,001	1,009	6,087	26
				CB cases			
Pending October 1, 1981	*2,883	67	10	2	24	2,009	771
Received fiscal 1982	7,944	118	40	22	95	6,408	1,261
On docket fiscal 1982	10,827	185	50	24	119	8,417	2,032
Closed fiscal 1982	7,481	104	39	13	80	5,984	1,261
Pending September 30, 1982	3,346	81	11	11	39	2,433	771
				CC cases			
Pending October 1, 1981	*797	15	0	1	18	32	731
Received fiscal 1982	1,476	55	4	9	65	21	1,322
On docket fiscal 1982	2,273	70	4	10	83	53	2,053
Closed fiscal 1982	1,481	54	4	8	56	36	1,323
Pending September 30, 1982	792	16	0	2	27	17	730
				CD cases			
Pending October 1, 1981	*173	9	0	0	2	2	160
Received fiscal 1982	435	38	0	1	14	9	373
On docket fiscal 1982	608	47	0	1	16	11	533
Closed fiscal 1982	394	29	0	0	13	9	343
Pending September 30, 1982	214	18	0	1	3	2	190
				CE cases			
Pending October 1, 1981	*125	4	1	0	24	6	90
Received fiscal 1982	70	1	0	0	0	2	67
On docket fiscal 1982	195	5	1	0	24	8	157
Closed fiscal 1982	72	4	1	0	1	6	60
Pending September 30, 1982	123	1	0	0	23	2	97
				CG cases			
Pending October 1, 1981	*30	0	0	1	2	1	26
Received fiscal 1982	48	0	0	0	3	1	44
On docket fiscal 1982	78	0	0	1	5	2	70
Closed fiscal 1982	47	0	0	0	4	1	42
Pending September 30, 1982	31	0	0	1	1	1	28
				CP cases			
Pending October 1, 1981	*151	16	0	0	2	3	130
Received fiscal 1982	375	19	0	2	6	5	343
On docket fiscal 1982	526	35	0	2	8	8	473
Closed fiscal 1982	368	18	0	2	6	3	339
Pending September 30, 1982	158	17	0	0	2	5	134

[1] See Glossary for definitions of terms.

*Revised. Reflects higher figures than reported as pending September 30, 1981, in last year's Annual Report. Revised totals result from post-report adjustments to last year's "on docket" and/or "closed" figures.

Table 1B.—Representation Cases Received, Closed, and Pending, Fiscal Year 1982[1]

	Total	Identification of filing party					
		AFL-CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
	RC cases						
Pending October 1, 1981	*3,327	1,968	819	228	296	16	....
Received fiscal 1982	5,605	2,996	1,519	463	613	14	....
On docket fiscal 1982	8,932	4,964	2,338	691	909	30	....
Closed fiscal 1982	5,687	3,062	1,593	452	568	12	....
Pending September 30, 1982	3,245	1,902	745	239	341	18	....
	RM cases						
Pending October 1, 1981	*292	....	....	....	....	....	292
Received fiscal 1982	707	....	....	....	....	....	707
On docket fiscal 1982	999	....	....	....	....	....	999
Closed fiscal 1982	614	....	....	....	....	....	614
Pending September 30, 1982	385	....	....	....	....	....	385
	RD cases						
Pending October 1, 1981	*511	1	1	1	1	507	....
Received fiscal 1982	1,964	12	2	5	1	1,944	....
On docket fiscal 1982	2,475	13	3	6	2	2,451	....
Closed fiscal 1982	1,651	8	2	6	1	1,634	....
Pending September 30, 1982	824	5	1	0	1	817	....

[1] See glossary for definitions of terms.

*Revised. Reflects higher figures than reported as pending September 30, 1981, in last year's Annual Report. Revised totals result from post-report adjustments to last year's "on docket" and/or "closed" figures.

Table 2.—Types of Unfair Labor Practices Alleged, Fiscal Year 1982

	Number of cases showing specific allegations	Percent of total cases
A. Charges filed against employers under sec. 8(a)		
Subsections of sec. 8(a): Total cases	27,749	100.0
8(a)(1)	4,845	17.8
8(a)(1)(2)	314	1.1
8(a)(1)(3)	10,490	37.8
8(a)(1)(4)	239	0.9
8(a)(1)(5)	7,476	26.9
8(a)(1)(2)(3)	227	0.8
8(a)(1)(2)(4)	8	0.0
8(a)(1)(2)(5)	113	0.4
8(a)(1)(3)(4)	699	2.5
8(a)(1)(3)(5)	2,996	10.8
8(a)(1)(4)(5)	12	0.0
8(a)(1)(2)(3)(4)	29	0.1
8(a)(1)(2)(3)(5)	141	0.5
8(a)(1)(2)(4)(5)	10	0.0
8(a)(1)(3)(4)(5)	134	0.5
8(a)(1)(2)(3)(4)(5)	16	0.1
Recapitulation [1]		
8(a)(1) [2]	27,749	100.0
8(a)(2)	858	3.1
8(a)(3)	14,732	53.1
8(a)(4)	1,147	4.1
8(a)(5)	10,898	39.3
B. Charges filed against unions under sec. 8(b)		
Subsections of sec. 8(b): Total cases	10,25[illegible]	100.0
8(b)(1)	5,692	55.6
8(b)(2)	129	1.3
8(b)(3)	421	4.1
8(b)(4)	1,911	18.7
8(b)(5)	7	0.1
8(b)(6)	15	0.2
8(b)(7)	375	3.7
8(b)(1)(2)	1,290	12.6
8(b)(1)(3)	263	2.6
8(b)(1)(5)	20	0.2
8(b)(1)(6)	4	0.0
8(b)(2)(3)	15	0.2
8(b)(2)(5)	2	0.0
8(b)(3)(6)	1	0.0
8(b)(1)(2)(3)	69	0.7
8(b)(1)(2)(5)	3	0.0
8(b)(1)(2)(6)	4	0.0
8(b)(1)(3)(5)	4	0.0
8(b)(1)(3)(6)	3	0.0
8(b)(1)(2)(3)(6)	1	0.0
8(b)(1)(2)(3)(5)(6)	1	0.0

	Number of cases showing specific allegations	Percent of total cases
Recapitulation [1]		
8(b)(1)	7,354	71.9
8(b)(2)	1,514	14.8
8(b)(3)	778	7.6
8(b)(4)	1,911	18.7
8(b)(5)	37	0.4
8(b)(6)	29	0.3
8(b)(7)	375	3.7
B1. Analysis of 8(b)(4)		
Total cases 8(b)(4)	1,911	100.0
8(b)(4)(A)	130	6.8
8(b)(4)(B)	1,214	63.5
8(b)(4)(C)	14	0.7
8(b)(4)(D)	435	22.8
8(b)(4)(A)(B)	105	5.5
8(b)(4)(A)(C)	1	0.1
8(b)(4)(B)(C)	10	0.5
8(b)(4)(A)(B)(C)	2	0.1
Recapitulation [1]		
8(b)(4)(A)	238	12.5
8(b)(4)(B)	1,331	69.6
8(b)(4)(C)	27	1.4
8(b)(4)(D)	435	22.8
B2. Analysis of 8(b)(7)		
Total cases 8(b)(7)	375	100.0
8(b)(7)(A)	119	31.7
8(b)(7)(B)	10	2.7
8(b)(7)(C)	234	62.43
8(b)(7)(A)(B)	4	1.1
8(b)(7)(A)(C)	7	1.9
8(b)(7)(B)(C)	1	0.3
Recapitulation [1]		
8(b)(7)(A)	130	34.7
8(b)(7)(B)	15	4.0
8(b)(7)(C)	242	64.5
C. Charges filed under sec. 8(e)		
Total cases 8(e)	70	100.0
Against unions alone	70	100.0
D. Charges filed under sec. 8(g)		
Total cases 8(g)	48	100.0

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[1] A single case may include allegations of violations of more than one subsection of the Act. Therefore, the total of the various allegations is greater than the total number of cases.

[2] Sec. 8(a)(1) is a general provision forbidding any type of employer interference with the rights of the employees guaranteed by the Act, and therefore is included in all charges of employer unfair labor practices.

Table 3A.—Formal Actions Taken in Unfair Labor Practice Cases, Fiscal Year 1982 [1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case											
		Total formal actions taken	CA	CB	CC	CD		CE	CG	CP	CA combined with CB	C combined with representation cases	Other C combinations
						Jurisdictional disputes	Unfair labor practices						
10(k) notices of hearings issued	95	85				85							
Complaints issued	5,626	4,126	3,554	352	161		9	7	3	30	5	2	3
Backpay specifications issued	138	126	95	26	5		0	0	0	0	0	0	0
Hearings completed, total	1,599	1,168	995	108	33	29	0	0	0	2	1	0	0
Initial ULP hearings	1,538	1,124	954	106	32	29	0	0	0	2	1	0	0
Backpay hearings	53	37	35	1	1		0	0	0	0	0	0	0
Other hearings	8	7	6	1	0		0	0	0	0	0	0	0
Decisions by administrative law judges, total	1,557	1,122	948	93	23		0	2	0	3	13	33	7
Initial ULP decisions	1,534	1,102	943	83	18		0	2	0	3	13	33	7
Backpay decisions	23	20	5	10	5		0	0	0	0	0	0	0
Supplemental decisions	0	0	0	0	0		0	0	0	0	0	0	0
Decisions and orders by the Board, total	1,731	1,631	1,394	98	36	48	1	3	0	3	14	28	6
Upon consent of parties:													
Initial decisions	150	149	149	0	0		0	0	0	0	0	0	0
Supplemental decisions	0	0	0	0	0		0	0	0	0	0	0	0
Adopting administrative law judges' decisions (no exceptions filed):													
Initial ULP decisions	389	371	332	17	3		0	1	0	0	2	12	4
Backpay decisions	3	3	3	0	0		0	0	0	0	0	0	0
Contested:													
Initial ULP decisions	1,128	1,051	863	72	32	48	1	2	0	3	12	16	2
Decisions based on stipulated record	15	15	8	6	1		0	0	0	0	0	0	0
Supplemental ULP decisions	7	5	5	0	0		0	0	0	0	0	0	0
Backpay decisions	39	37	34	3	0		0	0	0	0	0	0	0

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[1] See Glossary for definitions of terms.

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1982[1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case				
		Total formal actions taken	RC	RM	RD	UD
Hearings completed, total	1,493	1,374	1,087	92	195	7
Initial hearings	1,309	1,205	945	91	169	6
Hearings on objections and/or challenges	184	169	142	1	26	1
Decisions issued, total	1,468	1,295	1,040	119	136	4
By regional directors	1,359	1,198	960	113	125	4
Elections directed	1,217	1,069	855	89	125	2
Dismissals on record	142	129	106	24	0	2
By Board	109	97	80	6	11	0
Transferred by regional directors for initial decision	31	27	23	1	3	0
Elections directed	14	13	10	1	2	0
Dismissals on record	17	14	13	0	1	0
Review of regional directors' decisions:						
Requests for review received	625	623	567	18	38	1
Withdrawn before request ruled upon	6	6	3	1	2	0
Board action on request ruled upon, total	[illegible]	169	153	4	12	1
Granted	16	14	13	0	1	0
Denied	175	155	140	4	11	1
Remanded	0	0	0	0	0	0
Withdrawn after request granted, before Board review	0	0	0	0	0	0
Board decision after review, total	78	70	57	5	8	0
Regional directors' decisions:						
Affirmed	35	31	26	2	3	0
Modified	25	22	20	1	1	0
Reversed	18	17	11	2	4	0
Outcome:						
Election directed	59	52	42	4	6	0
Dismissals on record	19	18	15	1	2	0

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[1] See Glossary for definitions of terms.

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1982 [1]—Contd.

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case				
		Total formal actions taken	RC	RM	RD	UD
Decisions on objections and/or challenges, total	954	896	793	25	78	10
By regional directors	272	235	204	8	23	7
By Board	682	661	589	17	55	3
In stipulated elections	628	609	545	15	49	3
No exceptions to regional directors' reports	278	261	229	8	24	3
Exceptions to regional directors' reports	350	348	316	7	25	0
In directed elections (after transfer by regional director)	54	52	44	2	6	0
Review of regional directors' supplemental decisions:						
Request for review received	58	57	51	1	5	0
Withdrawn before request ruled upon	1	1	1	0	0	0
Board action on request ruled upon, total	68	60	54	1	5	1
Granted	13	13	13	0	0	0
Denied	55	47	41	1	5	1
Remanded	0	0	0	0	0	0
Withdrawn after request granted, before Board review	0	0	0	0	0	0
Board decision after review, total	0	0	0	0	0	0
Regional directors' decisions:						
Affirmed	0	0	0	0	0	0
Modified	0	0	0	0	0	0
Reversed	0	0	0	0	0	0

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[1] See Glossary for definitions of terms.

Table 3C.—Formal Actions Taken in Amendment of Certification and Unit Clarification Cases, Fiscal Year 1982 [1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case	
		AC	UC
Hearings completed	118	6	97
Decisions issued after hearing	131	9	115
By regional directors	128	9	113
By Board	3	0	2
Transferred by regional directors for initial decision	3	0	2
Review of regional directors' decisions:			
Requests for review received	17	4	9
Withdrawn before request ruled upon	0	0	0
Board action on requests ruled upon, total	17	4	9
Granted	4	2	2
Denied	10	1	5
Remanded	3	1	2
Withdrawn after request granted, before Board review	0	0	0
Board decision after review, total	0	0	0
Regional directors' decisions:			
Affirmed	0	0	0
Modified	0	0	0
Reversed	0	0	0

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[1] See Glossary for definitions of terms.

Table 4.—Backpay, Reimbursements, Reinstatements, Fiscal Year 1982*

A.	Backpay Received by Discriminatees	$29,886,550
	Fees, Dues, & Fines Reimbursed to Discriminatees	$517,067
B.	Discriminatees Offered Reinstatement	6,332
	Discriminatees Reinstated	3,731
	Discriminatees Refusing Reinstatement	2,601

*Information usually provided by this Table is not available this year due to technical problems. The data provided reflect *actual* backpay, reimbursements, and reinstatements during fiscal year 1982, and should not be compared to prior years' data which pertain to *Cases Closed* in those years.

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 1982 [1]

Industrial group [2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Food and kindred products	1,857	1,469	1,091	324	41	7	0	0	6	352	248	24	80	9	7	20
Tobacco manufacturers	47	43	34	7	2	0	0	0	0	4	4	0	0	0	0	0
Textile mill products	368	308	245	62	1	0	0	0	0	57	39	6	12	2	0	1
Apparel and other finished products made from fabric and similar materials	441	364	300	60	1	1	0	0	2	71	45	7	19	3	0	3
Lumber and wood products (except furniture)	618	480	377	69	32	1	0	0	1	123	70	14	39	5	0	10
Furniture and fixtures	501	418	325	91	1	0	0	0	1	78	53	9	16	5	0	0
Paper and allied products	497	415	314	97	4	0	0	0	0	74	51	2	21	1	0	7
Printing, publishing, and allied products	837	628	507	108	7	2	2	0	2	191	118	21	52	3	5	10
Chemicals and allied products	832	657	514	121	19	2	0	0	1	158	101	16	41	9	2	6
Petroleum refining and related industries	334	284	210	41	30	3	0	0	0	45	21	6	18	1	1	3
Rubber and miscellaneous plastic products	533	424	339	80	4	1	0	0	0	102	70	2	30	4	0	3
Leather and leather products	140	106	80	24	1	0	0	0	1	31	22	2	7	2	0	1
Stone, clay, glass, and concrete products	728	593	430	139	18	3	1	0	7	121	80	8	33	5	2	7
Primary metal industries	1,158	1,018	716	280	18	2	0	0	2	128	84	6	38	5	2	5
Fabricated metal products (except machinery and transportation equipment)	1,456	1,202	910	256	20	9	2	0	5	231	154	22	55	12	0	11
Machinery (except electrical)	1,968	1,693	1,217	397	55	20	0	0	4	240	156	19	65	12	4	19
Electrical and electronic machinery, equipment, and supplies	945	793	588	185	12	6	1	0	1	140	91	10	39	3	0	9
Aircraft and parts	330	313	196	117	0	0	0	0	0	14	7	2	5	1	0	2
Ship and boat building and repairing	224	210	134	74	2	0	0	0	0	14	13	0	1	0	0	0
Automotive and other transportation equipment	877	760	493	257	9	1	0	0	0	108	65	5	38	3	0	6
Measuring, analyzing, and controlling instruments; photographic, medical, and optical goods, watches and clocks	371	291	226	57	7	1	0	0	0	74	48	6	20	0	2	4
Miscellaneous manufacturing industries	1,749	1,375	891	396	51	19	5	0	13	334	254	11	69	19	2	19
Manufacturing	16,811	13,844	10,137	3,242	330	78	11	0	46	2,690	1,794	198	698	104	27	146

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 1982 [1]—Continued

Industrial group [2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Metal mining	119	106	79	27	0	0	0	0	0	10	5	0	5	1	0	2
Coal mining	469	396	273	83	22	7	0	0	11	67	57	2	8	0	0	6
Oil and gas extraction	76	64	46	11	3	2	0	0	2	11	5	0	6	0	0	1
Mining and quarrying of nonmetallic minerals (except fuels)	102	87	55	26	4	2	0	0	0	14	8	2	4	0	1	0
Mining	766	653	453	147	29	11	0	0	13	102	75	4	23	1	1	9
Construction	5,134	4,641	2,365	1,134	707	252	27	0	156	463	254	129	80	10	0	20
Wholesale trade	3,008	2,193	1,731	390	47	10	3	0	12	747	449	79	219	27	2	39
Retail trade	5,129	3,853	3,145	525	86	13	8	0	76	1,169	717	129	323	74	2	31
Finance, insurance, and real estate	819	627	506	95	21	0	1	0	4	180	136	12	32	2	1	9
U.S. Postal Service	1,327	1,320	1,104	216	0	0	0	0	0	6	5	0	1	1	0	0
Local and suburban transit and interurban highway passenger transportation	575	447	358	83	2	0	2	0	2	122	98	7	17	3	1	2
Motor freight transportation and warehousing	2,918	2,465	1,841	505	82	10	2	0	25	434	275	37	122	9	1	9
Water transportation	346	300	155	116	10	13	2	0	4	44	36	3	5	0	0	2
Other transportation	455	340	213	98	19	5	0	0	5	111	85	8	18	2	0	2
Communication	871	628	470	140	9	9	0	0	0	220	173	4	43	5	0	18
Electric, gas, and sanitary services	581	469	357	83	18	7	4	0	0	96	74	6	16	1	0	15
Transportation, communication, and other utilities	5,746	4,649	3,394	1,025	140	44	10	0	36	1,027	741	65	221	20	2	48
Hotels, rooming houses, camps, and other lodging places	912	759	578	151	18	5	3	0	4	144	111	11	22	4	0	5
Personal services	356	251	203	41	7	0	0	0	0	91	62	4	25	11	0	3
Automotive repair, services, and garages	460	295	250	41	3	0	0	0	1	154	105	8	41	7	1	3
Motion pictures	310	271	169	97	2	1	0	0	2	34	28	1	5	2	0	3

Amusement and recreation services (except motion pictures)	462	349	234	88	15	4	3	0	5	103	66	4	33	4	1	5
Health services	2,720	1,897	1,586	244	17	1	0	48	1	704	526	32	146	18	8	98
Educational services	276	203	165	29	8	0	0	0	1	58	44	1	13	4	2	9
Membership organizations	430	368	183	162	15	2	3	0	3	86	30	3	3	1	0	25
Business services	1,763	1,358	1,089	223	21	12	0	0	13	380	311	22	47	8	2	15
Miscellaneous repair services	178	122	89	27	3	2	0	0	1	52	37	1	14	2	0	2
Legal services	64	53	49	3	0	0	0	0	1	8	7	1	0	0	0	3
Museums, art galleries, and botanical and zoological gardens	13	9	9	0	0	0	0	0	0	4	4	0	0	0	0	0
Social services	247	174	156	18	0	0	0	0	0	63	57	2	4	1	0	9
Miscellaneous services	75	56	43	12	1	0	0	0	0	17	12	1	4	1	0	1
Services	8,266	6,165	4,803	1,136	110	27	9	48	32	1,848	1,400	91	357	63	14	176
Public administration	204	152	111	34	6	0	1	0	0	44	34	0	10	3	0	5
Total, all industrial groups	47,210	38,097	27,749	7,944	1,476	435	70	48	375	8,276	5,605	707	1,964	305	49	483

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[1] See Glossary for definitions of terms.

[2] Source: Standard Industrial Classification, Statistical Policy Division, Office of Management and Budget, Washington, 1972.

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 1982 [1]

Division and State [2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Maine	172	118	93	23	2	0	0	0	0	50	43	0	7	0	0	4
New Hampshire	110	78	65	13	0	0	0	0	0	26	23	0	3	0	1	5
Vermont	74	54	46	8	0	0	0	0	0	19	16	1	2	1	0	0
Massachusetts	1,420	1,126	875	179	43	19	3	3	4	264	204	15	45	3	1	26
Rhode Island	179	150	102	41	6	0	0	0	1	24	14	3	7	0	0	5
Connecticut	871	646	503	123	15	5	0	0	0	203	161	12	30	9	6	7
New England	2,826	2,172	1,684	387	66	24	3	3	5	586	461	31	94	13	8	47
New York	4,403	3,640	2,378	1,065	106	29	2	6	54	689	540	45	104	17	3	54
New Jersey	1,541	1,221	909	214	56	27	5	1	9	291	246	13	32	18	0	11
Pennsylvania	2,461	2,017	1,393	418	105	61	4	11	25	397	292	21	84	16	1	30
Middle Atlantic	8,405	6,878	4,680	1,697	267	117	11	18	88	1,377	1,078	79	220	51	4	95
Ohio	2,880	2,433	1,823	464	95	24	1	1	25	397	255	35	107	26	0	24
Indiana	1,877	1,698	1,263	396	22	9	4	0	4	165	107	6	52	10	0	4
Illinois	2,942	2,404	1,635	547	147	36	2	1	36	496	317	38	141	20	3	19
Michigan	2,384	1,928	1,503	353	47	19	1	3	2	418	261	18	139	22	0	16
Wisconsin	1,097	883	695	156	20	11	0	0	1	185	114	13	58	2	0	27
East North Central	11,180	9,346	6,919	1,916	331	99	8	5	68	1,661	1,054	110	497	80	3	90
Iowa	338	247	206	34	4	2	0	1	0	88	58	11	19	2	0	1
Minnesota	553	352	252	47	40	7	1	0	5	188	121	9	58	5	0	8
Missouri	1,665	1,395	968	296	75	25	2	1	28	246	166	17	63	4	4	16
North Dakota	45	33	28	5	0	0	0	0	0	12	9	1	2	0	0	0
South Dakota	26	22	21	1	0	0	0	0	0	4	3	1	0	0	0	0
Nebraska	147	120	96	23	0	0	1	0	0	26	16	2	8	0	0	1
Kansas	313	262	208	43	5	2	0	0	4	49	32	4	13	1	0	1
West North Central	3,087	2,431	1,779	449	124	36	4	2	37	613	405	45	163	12	4	27

Delaware	138	81	74	5	2	0	0	0	0	52	38	4	10	2	0	3
Maryland	797	668	461	183	11	7	0	1	5	123	89	7	27	1	0	5
District of Columbia	325	209	169	34	3	0	1	2	0	97	73	9	15	2	0	17
Virginia	543	459	374	83	1	0	0	0	1	82	63	4	15	0	1	1
West Virginia	522	445	302	102	18	6	0	0	17	71	59	6	6	0	0	6
North Carolina	500	439	374	65	0	0	0	0	0	60	48	3	9	0	0	1
South Carolina	173	141	121	20	0	0	0	0	0	31	25	3	3	0	1	0
Georgia	917	770	617	146	2	1	0	0	4	138	96	12	30	2	0	7
Florida	996	801	618	116	44	14	0	0	9	187	145	10	32	0	3	5
South Atlantic	4,911	4,013	3,110	754	81	28	1	3	36	841	636	58	147	7	5	45
Kentucky	767	633	505	106	12	6	1	0	3	117	75	7	35	3	1	13
Tennessee	856	734	603	109	18	3	0	0	1	120	76	11	38	0	0	2
Alabama	540	402	319	77	5	0	0	0	1	126	87	6	33	1	4	7
Mississippi	240	197	162	33	1	1	0	0	0	34	21	2	11	0	0	9
East South Central	2,403	1,966	1,589	325	36	10	1	0	5	397	259	26	112	4	5	31
Arkansas	272	163	145	17	1	0	0	0	0	100	64	8	28	6	1	2
Louisiana	448	373	279	85	4	5	0	0	0	72	54	1	17	0	2	1
Oklahoma	330	285	241	30	8	4	1	0	1	37	27	3	7	2	0	6
Texas	1,200	1,076	774	251	36	11	2	0	2	122	89	6	27	0	2	0
West South Central	2,250	1,897	1,439	383	49	20	3	0	3	331	234	18	79	8	5	9
Montana	240	171	126	33	8	1	0	0	3	60	37	2	21	6	0	3
Idaho	153	90	78	9	1	1	0	0	1	57	37	5	15	5	0	1
Wyoming	79	63	44	17	1	0	0	1	0	16	8	2	6	0	0	0
Colorado	780	639	480	128	19	4	2	4	2	124	68	9	47	8	0	9
New Mexico	190	145	103	38	3	0	0	0	1	39	25	5	9	1	2	3
Arizona	811	662	463	173	21	4	0	0	1	137	85	22	30	2	3	7
Utah	118	84	66	15	0	1	2	0	0	30	21	1	8	0	0	4

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 1982 [1]—Continued

Division and State [2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Nevada	470	419	301	93	12	6	1	1	5	47	29	6	12	0	1	3
Mountain	2,841	2,273	1,661	506	65	17	5	6	13	510	310	52	148	22	6	30
Washington	1,486	1,141	769	235	103	18	2	2	12	315	157	25	133	18	0	12
Oregon	560	336	253	45	20	7	1	0	10	196	87	42	67	16	0	12
California	6,348	5,009	3,425	1,096	307	59	28	7	87	1,219	756	202	261	45	6	69
Alaska	303	243	141	71	22	0	1	0	8	56	33	14	9	1	0	3
Hawaii	293	193	147	38	5	0	1	1	1	67	50	1	16	26	2	5
Guam	6	4	4	0	0	0	0	0	0	2	0	1	1	0	0	0
Pacific	8,996	6,926	4,739	1,485	457	84	33	10	118	1,855	1,083	285	487	106	8	101
Puerto Rico	286	185	141	40	0	0	1	1	2	90	71	3	16	2	1	8
Virgin Islands	25	10	8	2	0	0	0	0	0	15	14	0	1	0	0	0
Outlying areas	311	195	149	42	0	0	1	1	2	105	85	3	17	2	1	8
Total, all States and areas	47,210	38,097	27,749	7,944	1,476	435	70	48	375	8,276	5,605	707	1,964	305	49	483

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[1] See Glossary for definitions of terms.

[2] The States are grouped according to the method used by the Bureau of the Census, U.S. Department of Commerce.

Table 6B.—Standard Federal Administrative Regional Distribution of Cases Received Fiscal Year 1982 [1]

Standard Federal Regions [2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Connecticut	871	646	503	123	15	5	0	0	0	203	161	12	30	9	6	7
Maine	172	118	93	23	2	0	0	0	0	50	43	0	7	0	0	4
Massachusetts	1,420	1,126	875	179	43	19	3	3	4	264	204	15	45	3	1	26
New Hampshire	110	78	65	13	0	0	0	0	0	26	23	0	3	0	1	5
Rhode Island	179	150	102	41	6	0	0	0	1	24	14	3	7	0	0	5
Vermont	74	54	46	8	0	0	0	0	0	19	16	1	2	1	0	0
Region I	2,826	2,172	1,684	387	66	24	3	3	5	586	461	31	94	13	8	47
Delaware	138	81	74	5	2	0	0	0	0	52	38	4	10	2	0	3
New Jersey	1,541	1,221	909	214	56	27	5	1	9	291	246	13	32	18	0	11
New York	4,403	3,640	2,378	1,065	106	29	2	6	54	689	540	45	104	17	3	54
Puerto Rico	286	185	141	40	0	0	1	1	2	90	71	3	16	2	1	8
Virgin Islands	25	10	8	2	0	0	0	0	0	15	14	0	1	0	0	0
Region II	6,393	5,137	3,510	1,326	164	56	8	8	65	1,137	909	65	163	39	4	76
District of Columbia	325	209	169	34	3	0	1	2	0	97	73	9	15	2	0	17
Maryland	797	668	461	183	11	7	0	1	5	123	89	7	27	1	0	5
Pennsylvania	2,461	2,017	1,393	418	105	61	4	11	25	397	292	21	84	16	1	30
Virginia	543	459	374	83	1	0	0	0	1	82	63	4	15	0	1	1
West Virginia	522	445	302	102	18	6	0	0	17	71	59	6	6	0	0	6
Region III	4,648	3,798	2,699	820	138	74	5	14	48	770	576	47	147	19	2	59
Alabama	540	402	319	77	5	0	0	0	1	126	87	6	33	1	4	7
Florida	996	801	618	116	44	14	0	0	9	187	145	10	32	0	3	5
Georgia	917	770	617	146	2	1	0	0	4	138	96	12	30	2	0	7
Kentucky	767	633	505	106	12	6	1	0	3	117	75	7	35	3	1	13
Mississippi	240	197	162	33	1	1	0	0	0	34	21	2	11	0	0	9
North Carolina	500	439	374	65	0	0	0	0	0	60	48	3	9	0	0	1
South Carolina	173	141	121	20	0	0	0	0	0	31	25	3	3	0	1	0
Tennessee	856	734	603	109	18	3	0	0	1	120	76	11	33	0	0	2

Table 6B.—Standard Federal Administrative Regional Distribution of Cases Received Fiscal Year 1982 [1]—Continued

Standard Federal Regions [2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Region IV	4,989	4,117	3,319	672	82	25	1	0	18	813	573	54	186	6	9	44
Illinois	2,942	2,404	1,635	547	147	36	2	1	36	496	317	38	141	20	3	19
Indiana	1,877	1,698	1,263	396	22	9	4	0	4	165	107	6	52	10	0	4
Michigan	2,384	1,928	1,503	353	47	19	1	3	2	418	761	18	139	22	0	16
Minnesota	553	352	252	47	40	7	1	0	5	188	121	9	58	5	0	8
Ohio	2,880	2,433	1,823	464	95	24	1	1	25	397	255	35	107	26	0	24
Wisconsin	1,097	883	695	156	20	11	0	0	1	185	114	13	58	2	0	27
Region V	11,733	9,698	7,171	1,963	371	106	9	5	73	1,849	1,175	119	555	85	8	98
Arkansas	272	163	145	17	1	0	0	0	0	100	64	8	28	6	1	2
Louisiana	448	373	279	85	4	5	0	0	0	72	54	1	17	0	2	1
New Mexico	190	145	108	38	3	0	0	0	1	39	25	5	9	1	2	3
Oklahoma	330	285	241	30	8	4	1	0	1	37	27	3	7	2	0	6
Texas	1,200	1,076	774	251	36	11	2	0	2	122	89	6	27	0	2	0
Region VI	2,440	2,042	1,542	421	52	20	3	0	4	370	259	23	88	9	7	12
Iowa	338	247	206	34	4	2	0	1	0	88	58	11	19	2	0	1
Kansas	313	262	208	43	5	2	0	0	4	49	32	4	13	1	0	1
Missouri	1,665	1,395	968	296	75	25	2	1	28	246	166	17	63	4	4	16
Nebraska	147	120	96	23	0	0	1	0	0	26	16	2	8	0	0	1
Region VII	2,463	2,024	1,478	396	84	29	3	2	32	409	272	34	103	7	4	19
Colorado	780	639	480	128	19	4	2	4	2	124	68	9	47	8	0	9
Montana	240	171	126	33	8	1	0	0	3	60	37	2	21	6	0	3
North Dakota	45	33	28	5	0	0	0	0	0	12	9	1	2	0	0	0
South Dakota	26	22	21	1	0	0	0	0	0	4	3	1	0	0	0	0
Utah	118	84	66	15	0	1	2	0	0	30	21	1	8	0	0	4
Wyoming	79	63	44	17	1	0	0	1	0	16	8	2	6	0	0	0
Region VIII	1,288	1,012	765	199	28	6	4	5	5	246	146	16	84	14	0	16

Arizona	811	662	463	173	21	4	0	0	1	137	85	22	30	2	3	7
California	6,348	5,009	3,425	1,096	307	59	28	7	87	1,219	756	202	261	45	6	69
Hawaii	293	193	147	38	5	0	1	1	1	67	50	1	16	26	2	5
Guam	6	4	4	0	0	0	0	0	0	2	0	1	1	0	0	0
Nevada	470	419	301	93	12	6	1	1	5	47	29	6	12	0	1	3
Region IX	7,928	6,287	4,340	1,400	345	69	30	9	94	1,472	920	232	320	73	12	84
Alaska	303	243	141	71	22	0	1	0	8	56	33	14	9	1	0	3
Idaho	153	90	78	9	1	1	0	0	1	57	37	5	15	5	0	1
Oregon	560	336	253	45	20	7	1	0	10	196	87	42	67	16	0	12
Washington	1,486	1,141	769	235	103	18	2	2	12	315	157	25	133	18	0	12
Region X	2,502	1,810	1,241	360	146	26	4	2	31	624	314	86	224	40	0	28
Total, all States and areas	47,210	38,097	27,749	7,944	1,476	435	70	48	375	8,276	5,605	707	1,964	305	49	483

[1] See Glossary for definitions of terms.

[2] The States are grouped according to the 10 Standard Federal Administrative Regions.

Table 7.—Analysis of Methods of Disposition of Unfair Labor Practice Cases Closed, Fiscal Year 1982 [1]

Method and stage of disposition	All C cases			CA cases		CB cases		CC cases		CD cases		CE cases		CG cases		CP cases	
	Number	Percent of total closed	Percent of total method	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed
Total number of cases closed	36,424	100.0	0.0	26,581	100.0	7,481	100.0	1,481	100.0	394	100.0	72	100.0	47	100.0	368	100.0
Agreement of the parties	9,817	27.0	100.0	7,889	29.6	1,122	14.9	650	43.8	10	2.5	21	29.1	11	23.4	114	30.9
Informal settlement	9,677	26.6	98.6	7,800	29.3	1,105	14.7	621	41.9	10	2.5	21	29.1	11	23.4	109	29.6
Before issuance of complaint	5,835	16.0	59.5	4,540	17.1	746	10.0	458	30.9	(2)	....	16	22.2	8	17.0	67	18.2
After issuance of complaint, before opening of hearing	3,201	8.8	32.6	2,744	10.3	287	3.8	119	8.0	9	2.2	4	5.6	3	6.4	35	9.5
After hearing opened, before issuance of administrative law judge's decision	641	1.8	6.5	516	1.9	72	0.9	44	3.0	1	0.3	1	1.3	0	....	7	1.9
Formal settlement	140	0.4	1.4	89	0.3	17	0.2	29	1.9	0	....	0	....	0	....	5	1.3
After issuance of complaint, before opening of hearing	107	0.3	1.1	62	0.2	11	0.2	29	1.9	0	....	0	....	0	....	5	1.3
Stipulated decision	10	0.0	0.1	6	0.0	0	....	2	0.1	0	....	0	....	0	....	2	0.5
Consent decree	97	0.3	1.0	56	0.2	11	0.2	27	1.8	0	....	0	....	0	....	3	0.8
After hearing opened	33	0.1	0.3	27	0.1	6	0.0	0	....	0	....	0	....	0	....	0	....
Stipulated decision	1	0.0	0.0	0	....	1	0.0	0	....	0	....	0	....	0	....	0	....
Consent decree	32	0.1	0.3	27	0.1	5	0.0	0	....	0	....	0	....	0	....	0	....
Compliance with	1,113	3.0	100.0	861	3.3	169	2.3	67	4.5	1	0.3	3	4.2	3	6.4	9	2.4
Administrative law judge's decision	191	0.5	17.2	173	0.7	15	0.2	2	0.1	0	....	0	....	1	2.1	0	....
Board decision	628	1.7	56.4	420	1.6	134	1.8	59	4.0	1	0.3	3	4.2	2	4.3	9	2.4

Adopting administrative law judge's decision (no exceptions filed)	291	0.8	26.1	148	0.6	93	1.2	42	2.8	1	0.3	3	4.2	0	....	4	1.1
Contested	337	0.9	30.3	272	1.0	41	0.6	17	1.2	0	....	0	....	2	4.3	5	1.3
Circuit court of appeals decree	285	0.8	25.6	260	1.0	19	0.3	6	0.4	0	....	0	....	0	....	0	....
Supreme court action	9	0.0	0.8	8	0.0	1	0.0	0	....	0	....	0	....	0	....	0	....
Withdrawal	12,671	34.8	100.0	9,408	35.4	2,585	34.6	496	33.5	2	0.5	24	33.4	19	40.4	137	37.2
Before issuance of complaint	12,075	33.2	95.3	8,894	33.5	2,531	33.9	478	32.3	(²)	....	20	27.8	18	38.3	134	36.4
After issuance of complaint, before opening of hearing	571	1.6	4.5	493	1.8	50	0.7	18	1.2	2	0.5	4	5.6	1	2.1	3	0.8
After hearing opened, before administrative law judge's decision	14	0.0	0.1	12	0.1	2	0.0	0	....	0	....	0	....	0	....	0	....
After administrative law judge's decision, before Board decision	7	0.0	0.1	6	0.0	1	0.0	0	....	0	....	0	....	0	....	0	....
After Board or court decision	4	0.0	0.0	3	0.0	1	0.0	0	....	0	....	0	....	0	....	0	....
Dismissal	12,419	34.1	100.0	8,403	31.6	3,605	48.2	265	18.0	0	....	24	33.3	14	29.8	108	29.5
Before issuance of complaint	12,037	33.1	97.0	8,080	30.4	3,557	47.6	259	17.5	(²)	....	21	29.2	14	29.8	106	28.9
After issuance of complaint, before opening of hearing	132	0.4	1.1	116	0.4	13	0.2	1	0.0	0	....	1	1.3	0	....	1	0.3
After hearing opened, before administrative law judge's decision	4	0.0	0.0	2	0.0	2	0.0	0	....	0	....	0	....	0	....	0	....
By administrative law judge's decision	3	0.0	0.0	3	0.0	0	....	0	....	0	....	0	....	0	....	0	....
By Board Decision	240	0.7	1.9	201	0.8	32	0.4	4	0.3	0	....	2	2.8	0	....	1	0.3
Adopting administrative law judge's decision (no exceptions filed)	114	0.3	0.9	99	0.4	10	0.1	3	0.2	0	....	2	2.8	0	....	0	....
Contested	126	0.3	1.0	102	0.4	22	0.3	1	0.0	0	....	0	....	0	....	1	0.3
By circuit court of appeals decree	2	0.0	0.0	1	0.0	1	0.0	0	....	0	....	0	....	0	....	0	....
By Supreme Court action	1	0.0	0.0	0	....	0	....	1	0.0	0	....	0	....	0	....	0	....
10(k) actions (see table 7A for details of dispositions)	381	1.0	0.0	0	....	0	....	0	....	381	96.7	0	....	0	....	0	....
Otherwise (compliance with order of administrative law judge or Board not achieved—firm went out of business)	23	0.1	0.0	20	0.1	0	....	3	0.2	0	....	0	....	0	....	0	....

[1] See table 8 for summary of disposition by stage. See Glossary for definitions of terms.

[2] CD cases closed in this stage are processed as jurisdictional disputes under Sec. 10(k) of the Act. See table 7A.

Table 7A.—Analysis of Methods of Disposition of Jurisdictional Dispute Cases Closed Prior to Unfair Labor Practice Proceedings, Fiscal Year 1982

Method and stage of disposition	Number of cases	Percent of total closed
Total number of cases closed before issuance of complaint	381	100.0
Agreement of the parties—informal settlement	124	32.5
Before 10(k) notice	105	27.6
After 10(k) notice, before opening of 10(k) hearing	17	4.5
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	2	0.5
Compliance with Board Decision and determination of dispute	18	4.7
Withdrawal	152	39.9
Before 10(k) notice	124	32.5
After 10(k) notice, before opening of 10(k) hearing	20	5.2
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	1	0.3
After Board decision and determination of dispute	7	1.8
Dismissal	87	22.8
Before 10(k) notice	74	19.4
After 10(k) notice, before opening of 10(k) hearing	4	1.0
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	1	0.3
By Board decision and determination of dispute	8	2.1

Table 8.—Disposition by Stage of Unfair Labor Practice Cases Closed, Fiscal Year 1982 [1]

Stage of Disposition	All C cases		CA cases		CB cases		CC cases		CD cases		CE cases		CG cases		CP cases	
	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed
Total number of cases closed	36,424	100.0	26,581	100.0	7,481	100.0	1,481	100.0	394	100.0	72	100.0	47	100.0	368	100.0
Before issuance of complaint	30,328	83.3	21,514	80.9	6,834	91.3	1,195	80.8	381	96.7	57	79.2	40	85.1	307	83.4
After issuance of complaint, before opening of hearing	4,011	11.0	3,415	12.9	361	4.8	167	11.3	11	2.7	9	12.5	4	8.5	44	12.0
After hearing opened, before issuance of administrative law judge's decision	692	1.9	557	2.2	82	1.1	44	3.0	1	0.3	1	1.4	0	....	7	1.9
After administrative law judge's decision, before issuance of Board decision	201	0.6	182	0.7	16	0.2	2	0.1	0	....	0	....	1	2.1	0	....
After Board order adopting administrative law judge's decision in absence of exceptions	405	1.1	247	0.9	103	1.4	45	3.0	1	0.3	5	6.9	0	....	4	1.1
After Board decision, before circuit court decree	472	1.3	381	1.4	64	0.9	19	1.2	0	....	0	....	2	4.3	6	1.6
After circuit court decree, before Supreme Court action	300	0.8	274	1.0	20	0.3	6	0.4	0	....	0	....	0	....	0	....
After Supreme Court action	15	0.0	11	0.0	1	0.0	3	0.2	0	....	0	....	0	....	0	....

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[1] See Glossary for definitions of terms.

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Table 9.—Disposition by Stage of Representation and Union Deauthorization Cases Closed, Fiscal Year 1982 [1]

Stage of disposition	All R cases		RC cases		RM cases		RD cases		UD cases	
	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed
Total number of cases closed	7,952	100.0	5,687	100.0	614	100.0	1,651	100.0	259	100.0
Before issuance of notice of hearing	3,331	41.9	2,025	35.6	366	59.6	940	56.9	211	81.5
After issuance of notice, before close of hearing	3,590	45.1	2,859	50.3	170	27.7	561	34.0	22	8.5
After hearing closed, before issuance of decision	95	1.2	64	1.1	10	1.6	21	1.3	0	0.0
After issuance of regional director's decision	916	11.5	722	12.7	67	10.9	127	7.7	26	10.0
After issuance of Board decision	20	0.3	17	0.3	1	0.2	2	0.1	0	0.0

[1] See Glossary for definitions of terms.

Table 10.—Analysis of Methods of Disposition of Representation and Union Deauthorization Cases Closed, Fiscal Year 1982[1]

Method and stage of disposition	All cases		RC cases		RM cases		RD cases		UD cases	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total, all	7,952	100.0	5,687	100.0	614	100.0	1,651	100.0	259	100.0
Certification issued, total	5,027	63.2	3,917	68.9	246	40.1	864	52.3	130	50.2
After:										
Consent election	177	2.3	121	2.2	8	1.3	48	2.9	9	3.5
Before notice of hearing	85	1.1	52	.9	7	1.1	26	1.6	8	3.1
After notice of hearing, before hearing closed	87	1.1	66	1.2	1	.2	20	1.2	1	.4
After hearing closed, before decision	5	.1	3	.1	0	.0	2	.1	0	.0
Stipulated election	4,085	51.3	3,181	55.9	182	29.7	722	43.6	101	39.0
Before notice of hearing	1,751	22.0	1,278	22.5	107	17.5	366	22.1	84	32.4
After notice of hearing, hearing closed	2,283	28.7	1,861	32.7	75	12.2	347	21.0	17	6.6
After hearing closed, before decision	51	.6	42	.7	0	.0	9	.5	0	.0
Expedited election	8	.1	2	.0	5	.8	1	.1	0	.0
Regional director directed election	748	9.4	606	10.7	50	8.1	92	5.6	20	7.7
Board directed election	9	.1	7	.1	1	.2	1	.1	0	.0
By withdrawal, total	2,368	29.7	1,562	27.4	262	42.6	544	33.0	99	38.2
Before notice of hearing	1,192	15.0	622	10.8	185	30.1	385	23.3	95	36.7
After notice of hearing, before hearing closed	1,120	14.0	887	15.6	76	12.3	157	9.5	4	1.5
After hearing closed, before decision	11	.1	10	.2	1	.2	0	.0	0	.0
After regional director decision and direction of election	38	.5	37	.7	0	.0	1	.1	0	.0
After Board decision and direction of election	7	.1	6	.1	0	.0	1	.1	0	.0
By dismissal, total	557	7.1	208	3.7	106	17.3	243	14.7	30	11.6
Before notice of hearing	295	3.7	71	1.2	62	10.1	162	9.8	24	9.3
After notice of hearing, before hearing closed	100	1.3	45	.8	18	2.9	37	2.2	0	.0
After hearing closed, before decision	28	.4	9	.2	9	1.5	10	.6	0	.0
By regional director's decision	130	1.6	79	1.4	17	2.8	34	2.1	6	2.3
By Board decision	4	.1	4	.1	0	.0	0	.0	0	.0

[1] See Glossary for definitions of terms.

Table 10A.—Analysis of Methods of Disposition of Amendment of Certification and Unit Clarification Cases Closed, Fiscal Year 1982

	AC	UC
Total, all	39	429
Certification amended or unit clarification	19	74
Before hearing	0	0
By regional director's decision	0	0
By Board decision	0	0
After hearing	19	74
By regional director's decision	19	74
By Board decision	0	0
Dismissed	4	129
Before hearing	0	12
By regional director's decision	0	12
By Board decision	0	0
After hearing	4	117
By regional director's decision	4	117
By Board decision	0	0
Withdrawn	16	226
Before hearing	16	223
After hearing	0	3

Table 11.—Types of Elections Resulting in Certification in Cases Closed, Fiscal Year 1982 [1]

Type of case	Total	Type of election				
		Consent	Stipulated	Board-directed	Regional Director-directed	Expedited elections under 8(b)(7)(C)
All types, total:						
Elections	5,205	172	4,008	50	903	72
Eligible voters	300,904	4,845	216,692	5,305	69,933	4,129
Valid votes	260,136	3,939	187,874	4,589	60,134	3,650
RC cases:						
Elections	4,031	110	3,113	42	713	53
Eligible voters	244,292	2,857	179,809	4,594	53,456	3,576
Valid votes	210,487	2,209	155,866	3,932	45,315	3,165
RM cases:						
Elections	216	7	144	2	54	9
Eligible voters	14,334	184	4,355	49	9,582	164
Valid votes	13,162	163	3,795	43	9,019	142
RD cases:						
Elections	869	47	701	5	106	10
Eligible voters	39,138	1,061	31,137	629	5,922	389
Valid votes	33,950	923	27,137	533	5,014	343
UD cases:						
Elections	89	8	50	1	30	......
Eligible voters	3,140	743	1,391	33	973	......
Valid votes	2,537	644	1,076	31	786	......

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[1] See Glossary for definitions of terms.

Table 11A.—Analysis of Elections Conducted in Representation Cases Closed, Fiscal Year 1982

Type of election	All R elections				RC elections				RM elections				RD elections			
	Elections conducted				Elections conducted				Elections conducted				Elections conducted			
	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification [1]	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun of runoff	Resulting in certification	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification
All types	5,268	18	134	5,116	4,153	16	106	4,031	233	2	15	216	882	0	13	869
Rerun required			110				87				13				10	
Runoff required			24				19				2				3	
Consent elections	169	1	4	164	114	1	3	110	7	0	0	7	48	0	1	47
Rerun required			1				1				0				0	
Runoff required			3				2				0				1	
Stipulated elections	4,058	10	90	3,958	3,195	8	74	3,113	155	2	9	144	708	0	7	701
Rerun required			79				66				8				5	
Runoff required			11				8				1				2	
Regional director-directed	904	3	28	873	736	3	20	713	59	0	5	54	109	0	3	106
Rerun required			21				14				4				3	
Runoff required			7				6				1				0	
Board-directed	64	4	11	49	54	4	8	42	3	0	1	2	7	0	2	5
Rerun required			9				6				1				2	
Runoff required			2				2				0				0	
Expedited—sec. 8(b)(7)(C)	73	0	1	72	54	0	1	53	9	0	0	9	10	0	0	10
Rerun required			0				0				0				0	
Runoff required			1				1				0				0	

[1] The total of representation elections resulting in certification excludes elections held in UD cases which are included in the totals in table 11.

Table 11B.—Representation Elections in Which Objections and/or Determinative Challenges Were Ruled On in Cases Closed, Fiscal Year 1982

	Total elections	Objections only		Challenges only		Objections and challenges		Total objections [1]		Total challenges [2]	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
All representation elections	5,268	407	7.7	205	3.9	124	2.4	531	10.1	329	6.2
By type of case:											
In RC cases	4,153	375	9.0	151	3.6	114	2.7	489	11.8	265	6.4
In RM cases	233	7	3.0	10	4.3	1	0.4	8	3.4	11	4.7
In RD cases	882	25	2.8	44	5.0	9	1.0	34	3.9	53	6.0
By type of election:											
Consent elections	169	9	5.3	7	4.1	1	0.6	10	5.9	8	4.7
Stipulated elections	4,058	239	5.9	148	3.6	111	2.7	350	8.6	259	6.4
Expedited elections	73	5	6.8	2	2.7	1	1.4	6	8.2	3	4.1
Regional director-directed elections	904	146	16.2	46	5.1	10	1.1	156	17.3	56	6.2
Board-directed elections	64	8	12.5	2	3.1	1	1.6	9	14.1	3	4.7

[1] Number of elections in which objections were ruled on, regardless of number of allegations in each election.

[2] Number of elections in which challengers were ruled on, regardless of individual ballots challenged in each election.

Table 11C.—Objections Filed in Representation Cases Closed, by Party Filing, Fiscal Year 1982 [1]

	Total		By employer		By union		By both parties [2]	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
All representation elections	573	100.0	249	43.5	289	50.4	35	6.1
By type of case:								
RC cases	525	100.0	239	45.5	262	49.9	24	4.6
RM cases	11	100.0	3	27.3	5	45.4	3	27.3
RD cases	37	100.0	7	18.9	22	59.5	8	21.6
By type of election:								
Consent elections	10	100.0	3	30.0	5	50.0	2	25.0
Stipulated elections	367	100.0	167	45.5	185	50.4	15	4.1
Expedited elections	6	100.0	0	0.0	3	50.0	3	50.0
Regional director-directed elections	175	100.0	70	40.0	92	52.6	13	7.4
Board-directed elections	15	100.0	9	60.0	4	27.7	2	13.3

[1] See Glossary for definitions of terms.

[2] Objections filed by more than one party in the same cases are counted as one.

Table 11D.—Disposition of Objections in Representation Cases Closed, Fiscal Year 1982 [1]

	Objections filed	Objections withdrawn	Objections ruled upon	Overruled		Sustained[2]	
				Number	Percent of total ruled upon	Number	Percent of total ruled upon
All representation elections	573	42	531	401	75.5	130	24.5
By type of case:							
RC cases	525	36	489	365	74.6	124	25.4
RM cases	11	3	8	8	100.0	0	0.0
RD cases	37	3	34	28	82.4	6	17.6
By type of election:							
Consent elections	10	0	10	9	90.0	1	10.0
Stipulated elections	367	17	350	255	72.9	95	27.1
Expedited elections	6	0	6	5	83.3	1	16.7
Regional director-directed elections	175	19	156	126	80.8	30	19.2
Board-directed elections	15	6	9	6	66.7	3	33.3

[1] See Glossary for definitions of terms.

[2] See table 11E for rerun elections held after objections were sustained. In 20 elections in which objections were sustained, the cases were subsequently withdrawn. Therefore, in these cases no rerun elections were conducted.

Table 11E.—Results of Rerun Elections Held in Representation Cases Closed, Fiscal Year 1982 [1]

	Total rerun elections [2]		Union certified		No union chosen		Outcome of original election reversed	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
All representation elections	92	100.0	39	42.4	53	57.6	35	38.0
By type of case:								
RC cases	81	100.0	35	43.2	46	56.8	32	39.5
RM cases	5	100.0	1	20.0	4	80.0	1	20.0
RD cases	6	100.0	3	50.0	3	50.0	2	33.3
By type of election:								
Consent elections	1	100.0	0	0.0	1	100.0	0	0.0
Stipulated elections	77	100.0	32	41.6	45	58.4	33	42.9
Expedited elections	0	....	0	....	0	....	0	....
Regional director-directed elections	13	100.0	6	46.2	7	53.8	2	15.4
Board-directed elections	1	100.0	1	100.0	0	0.0	0	....

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[1] See Glossary for definitions of terms.

[2] More than 1 rerun election was conducted in 10 cases; however, only the final election is included in this table.

Table 12.—Results of Union-Shop Deauthorization Polls in Cases Closed, Fiscal Year 1982

Affiliation of union holding union-shop contract	Number of polls					Employees involved (number eligible to vote)[1]					Valid votes cast			
	Total	Resulting in deauthorization		Resulting in continued authorization		Total eligible	In polls				Total	Percent of total eligible	Cast for deauthorization	
		Number	Percent of total	Number	Percent of total		Resulting in deauthorization		Resulting in continued authorization				Number	Percent of total eligible
							Number	Percent of total	Number	Percent of total				
Total	89	55	61.8	34	38.2	3,140	1,269	40.4	1,871	59.6	2,537	80.8	1,075	34.2
AFL-CIO unions	50	28	56.0	22	44.0	1,903	877	46.1	1,026	53.9	1,482	77.9	696	36.6
Teamsters	24	17	70.8	7	29.2	327	206	63.0	121	37.0	275	84.1	103	31.5
Other national unions	3	2	66.7	1	33.3	32	24	75.0	8	25.0	30	93.8	10	31.3
Other local unions	12	8	66.7	4	33.3	878	162	18.5	716	81.5	750	85.4	266	30.3

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[1] Sec. 8(a)(3) of the Act requires that to revoke a union-shop agreement a majority of the employees eligible to vote must vote in favor of deauthorization.

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1982 [1]

Participating unions	Total elections[2]	Elections won by unions						Elections in which no representative chosen	Employees eligible to vote						In elections where no representative chosen
		Percent won	Total won	AFL-CIO unions	Teamsters	Other National unions	Other local unions		Total	In elections won	In units won by				
											AFL-CIO unions	Teamsters	Other national unions	Other local unions	
	A. All representation elections														
AFL-CIO	2,949	39.0	1,150	1,150				1,799	181,416	52,158	52,158				129,258
Teamsters	1,411	34.4	485		485			926	45,735	11,307		11,307			34,428
Other national unions	152	44.7	68			68		84	10,950	4,748			4,748		6,202
Other local unions	350	49.4	173				173	177	24,339	9,736				9,736	14,603
1-union elections	4,862	38.6	1,876	1,150	485	68	173	2,986	262,440	77,949	52,158	11,307	4,748	9,736	184,491
AFL-CIO v. AFL-CIO	44	50.0	22	22				22	6,861	2,415	2,415				4,446
AFL-CIO v. Teamsters	51	68.6	35	15	20			16	4,248	2,856	640	2,216			1,392
AFL-CIO v. national	22	59.1	13	7		6		9	5,471	3,315	1,909		1,406		2,156
AFL-CIO v. local	80	88.8	71	42			29	9	13,472	12,421	7,087			5,334	1,051
Teamsters v. national	2	0.0	0		0	0		2	173	0		0	0		173
Teamsters v. Teamsters	21	85.7	18		14		4	3	1,113	947		794		153	166
National v. local	2	100.0	2		2			0	10	10		10			0
National v. national	4	50.0	2			2	0	2	356	36			36	0	320
Local v. local	16	81.3	13				13	3	1,816	1,781				1,781	35
2-union elections	242	72.7	176	86	36	8	46	66	38,520	23,781	12,051	3,020	1,442	7,268	9,739
AFL-CIO v. AFL-CIO v. Teamsters	3	100.0	3	1	2			0	304	304	30	274			0
AFL-CIO v. Teamsters v. local	1	100.0	1	0	1		0	0	29	29	0	29		0	0
AFL-CIO v. national v. local	2	100.0	2	1		0	1	0	459	459	180		0	279	0
AFL-CIO v. local v. local	3	100.0	3	2			1	0	457	457	258			199	0
Teamsters v. local v. local	2	100.0	2		1		1	0	130	130		84		46	0
Local v. local v. local	1	100.0	1				1	0	425	425				425	0
3 (or more)-union elections	12	100.0	12	4	4	0	4	0	1,804	1,804	468	387	0	949	0
Total representation elections	5,116	40.3	2,064	1,240	525	76	223	3,052	297,764	103,534	64,677	14,714	6,190	17,953	194,230

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1982 [1]—Continued

Participating unions	Total elections[2]	Elections won by unions						Elections in which no representative chosen	Employees eligible to vote						
		Percent won	Total won	AFL-CIO unions	Teamsters	Other National unions	Other local unions		Total	In elections won	In units won by				In elections where no representative chosen
											AFL-CIO unions	Teamsters	Other national unions	Other local unions	
	B. Elections in RC cases														
AFL-CIO	2,281	43.5	992	992				1,289	144,899	39,928	39,928				104,971
Teamsters	1,100	38.5	423		423			677	38,223	8,839		8,839			29,384
Other national unions	132	47.0	62			62		70	10,022	4,412			4,412		5,610
Other local unions	293	56.3	165				165	128	21,685	8,966				8,966	12,719
1-union elections	3,806	43.1	1,642	992	423	62	165	2,164	214,829	62,145	39,928	8,839	4,412	8,966	152,684
AFL-CIO v. AFL-CIO	41	48.8	20	20				21	6,714	2,315	2,315				4,399
AFL-CIO v. Teamsters	44	72.7	32	14	18			12	3,943	2,786	576	2,210			1,157
AFL-CIO v. national	22	59.1	13	7		6		9	5,471	3,315	1,909		1,406		2,156
AFL-CIO v. local	67	88.1	59	36			23	8	9,747	8,761	6,136			2,625	986
Teamsters v. national	2	0.0	0		0	0		2	173	0		0	0		173
Teamsters v. local	19	84.2	16		12		4	3	1,000	834		681		153	166
Teamsters v. Teamsters	2	100.0	2		2			0	10	10		10			0
National v. local	4	50.0	2			2	0	2	356	36			36	0	320
Local v. local	14	85.7	12				12	2	519	497				497	22
2-union elections	215	72.6	156	77	32	8	39	59	27,933	18,554	10,936	2,901	1,442	3,275	9,379
AFL-CIO v. AFL-CIO v. Teamsters	1	100.0	1	1	0			0	30	30	30	0			0
AFL-CIO v. Teamsters v. local	1	100.0	1	0	1		0	0	29	29	0	29		0	0
AFL-CIO v. national v. local	2	100.0	2	1		0	1	0	459	459	180		0	279	0
AFL-CIO v. local v. local	3	100.0	3	2			1	0	457	457	258			199	0
Teamsters v. local v. local	2	100.0	2		1		1	0	130	130		84		46	0
Local v. local v. local	1	100.0	1				1	0	425	425				425	0
3 (or more)-union elections	10	100.0	10	4	2	0	4	0	1,530	1,530	468	113	0	949	0
Total RC elections	4,031	44.9	1,808	1,073	457	70	208	2,223	244,292	82,229	51,332	11,853	5,854	13,190	162,063

C. Elections in RM cases

AFL–CIO	131	18.3	24	24				107	9,672	943	943			8,729
Teamsters	60	23.3	14		14			46	1,316	438		438		878
Other national unions	4	50.0	2			2		2	70	18			18	52
Other local unions	11	9.1	1				1	10	381	28				28	353
1-union elections	206	19.9	41	24	14	2	1	165	11,439	1,427	943	438	18	28	10,012
AFL–CIO v. AFL–CIO	3	66.7	2	2				1	147	100	100				47
AFL–CIO v. Teamsters	1	100.0	1	0	1			0	2	2	0	2			0
AFL–CIO v. local[2]	5	80.0	4	0			4	1	2,685	2,620	0			2,620	65
Teamsters v. local	1	100.0	1		1		0	0	61	61		61		0	0
2-union elections	10	80.0	8	2	2	0	4	2	2,895	2,783	100	63	0	2,620	112
Total RM elections	216	22.7	49	26	16	2	5	167	14,334	4,210	1,043	501	18	2,648	10,124

D. Elections in RD cases

AFL–CIO	537	25.0	134	134				403	26,845	11,287	11,287				15,558
Teamsters	251	19.1	48		48			203	6,196	2,030		2,030			4,166
Other national unions	16	25.0	4			4		12	858	318			318		540
Other local unions	46	15.2	7				7	39	2,273	742				742	1,531
1-union elections	850	22.7	193	134	48	4	7	657	36,172	14,377	11,287	2,030	318	742	21,795
AFL–CIO v. Teamsters	6	33.3	2	1	1			4	303	68	64	4			235
AFL–CIO v. local	8	100.0	8	6			2	0	1,040	1,040	951			89	0
Teamsters v. local	1	100.0	1		1		0	0	52	52		52		0	0
Local v. local	2	50.0	1				1	1	1,297	1,284				1,284	13
2-union elections	17	70.6	12	7	2	0	3	5	2,692	2,444	1,015	56	0	1,373	248
AFL–CIO v. AFL–CIO v. Teamsters	2	100.0	2	0	2			0	274	274	0	274			0
3 (or more)-union elections	2	100.0	2	0	2	0	0	0	274	274	0	274	0	0	0
Total RD elections	869	23.8	207	141	52	4	10	662	39,138	17,095	12,302	2,360	318	2,115	22,043

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[1] See Glossary for definitions of terms.

[2] Includes each unit in which a choice as to collective-bargaining agent was made; for example, there may have been more than one election in a single case, or several cases may have been involved in one election unit.

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1982 [1]

Participating unions	Total valid votes cast	Valid votes cast in elections won						Valid votes cast in elections lost					
		Votes for unions					Total votes for no union	Votes for unions					Total votes for no union
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions	
	A. All representation elections												
AFL-CIO	158,101	29,503	29,503				14,615	36,843	36,843				77,140
Teamsters	40,500	6,950		6,950			3,053	9,178		9,178			21,319
Other national unions	9,305	2,678			2,678		1,345	1,767			1,767		3,515
Other local unions	20,334	5,871				5,871	2,027	3,696				3,696	8,740
1-union elections	228,240	45,002	29,503	6,950	2,678	5,871	21,040	51,484	36,843	9,178	1,767	3,696	110,714
AFL-CIO v. AFL-CIO	5,589	1,606	1,606				134	1,319	1,319				2,530
AFL-CIO v. Teamsters	3,585	2,334	1,114	1,220			98	333	91	242			820
AFL-CIO v. national	4,492	2,627	1,320		1,307		127	419	123		296		1,319
AFL-CIO v. local	11,400	10,350	5,563			4,787	204	291	110			181	555
Teamsters v. national	158	0		0	0		0	74		67	7		84
Teamsters v. local	974	745		508		237	91	61		21		40	77
Teamsters v. Teamsters	9	9		9			0	0		0			0
National v. local	304	34			32	2	0	102			57	45	168
Local v. local	1,336	1,235				1,235	70	9				9	22
2-union elections	27,847	18,940	9,603	1,737	1,339	6,261	724	2,608	1,643	330	360	275	5,575
AFL-CIO v. AFL-CIO v. Teamsters	300	252	76	176			48	0	0	0			0
AFL-CIO v. Teamsters v. local	26	26	0	15		11	0	0	0	0		0	0
AFL-CIO v. national v. local	416	323	100		12	211	93	0	0		0	0	0
AFL-CIO v. local v. local	312	303	166			137	9	0	0			0	0
Teamsters v. local v. local	122	121		75		46	1	0		0		0	0
Local v. local v. local	336	328				328	8	0				0	0
3 (or more)-union elections	1,512	1,353	342	266	12	733	159	0	0	0	0	0	0
Total representation elections	257,599	65,295	39,448	8,953	4,029	12,865	21,923	54,092	38,486	9,508	2,127	3,971	116,289

B. Elections in RC cases

AFL-CIO	125,820	22,584	22,584				10,896	29,836	29,836				62,504
Teamsters	33,846	5,557		5,557			2,302	7,816		7,816			18,171
Other national unions	8,478	2,455			2,455		1,282	1,574			1,574		3,167
Other local unions	18,151	5,427				5,427	1,815	3,204				3,204	7,705
1-union elections	186,295	36,023	22,584	5,557	2,455	5,427	16,295	42,430	29,836	7,816	1,574	3,204	91,547
AFL-CIO v. AFL-CIO	5,465	1,522	1,522				131	1,302	1,302				2,510
AFL-CIO v. Teamsters	3,307	2,274	1,065	1,209			96	287	52	235			650
AFL-CIO v. national	4,492	2,627	1,320		1,307		127	419	123		296		1,319
AFL-CIO v. local	7,917	6,986	4,125			2,861	137	286	107			179	508
Teamsters v. national	158	0		0	0		0	74		67	7		84
Teamsters v. local	868	666		431		235	64	61		21		40	77
Teamsters v. Teamsters	9	9		9			0	0		0			0
National v. local	304	34			32	2	0	102			57	45	168
Local v. local	431	371				371	41	7				7	12
2-union elections	22,951	14,489	8,032	1,649	1,339	3,469	596	2,538	1,584	323	360	271	5,328
AFL-CIO v. AFL-CIO v. Teamsters	29	28	18	10			1	0	0	0			0
AFL-CIO v. Teamsters v. local	26	26	0	15		11	0	0	0	0		0	0
AFL-CIO v. national v. local	416	323	100		12	211	93	0	0		0	0	0
AFL-CIO v. local v. local	312	303	166			137	9	0	0			0	0
Teamsters v. local v. local	122	121		75		46	1	0		0		0	0
Local v. local	336	328				328	8	0				0	0
3 (or more)-union elections	1,241	1,129	284	100	12	733	112	0	0	0	0	0	0
Total RC elections	210,487	51,641	30,900	7,306	3,806	9,629	17,003	44,968	31,420	8,139	1,934	3,475	96,875

C. Elections in RM cases

AFL-CIO	8,879	532	532				297	2,913	2,913				5,137
Teamsters	1,156	270		270			101	247		247			538
Other national unions	63	10			10		5	11			11		37
Other local unions	333	12				12	11	69				69	241
1-union elections	10,431	824	532	270	10	12	414	3,240	2,913	247	11	69	5,953

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1982 [1]—Continued

Participating unions	Total valid votes cast	Valid votes cast in elections won						Valid votes cast in elections lost					
		Votes for unions					Total votes for no union	Votes for unions					Total votes for no union
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions	
AFL-CIO v. AFL-CIO	124	84	84				3	17	17				20
AFL-CIO v. Teamsters	2	2	0	2			0	0	0	0			0
AFL-CIO v. local	2,550	2,469	885			1,584	29	5	3			2	47
Teamsters v. national	55	32		32		0	23	0		0		0	0
2-union elections	2,731	2,587	969	34	0	1,584	55	22	20	0	0	2	67
Total RM elections	13,162	3,411	1,501	304	10	1,596	469	3,262	2,938	247	11	71	6,020
	D. Elections in RD cases												
AFL-CIO	23,402	6,387	6,387				3,422	4,094	4,094				9,499
Teamsters	5,498	1,123		1,123			650	1,115		1,115			2,610
Other national unions	764	213			213		58	182			182		311
Other local unions	1,850	432				432	201	423				423	794
1-union elections	31,514	8,155	6,387	1,123	213	432	4,331	5,814	4,094	1,115	182	423	13,214
AFL-CIO v. Teamsters	276	58	49	9			2	46	39	7			170
AFL-CIO v. local	933	895	553			342	38	0	0			0	0
Teamsters v. local	51	47		45		2	4	0		0		0	0
Local v. local	905	864				864	29	2				2	10
2-union elections	2,165	1,864	602	54	0	1,208	73	48	39	7	0	2	180
AFL-CIO v. AFL-CIO v. Teamsters	271	224	58	166			47	0	0	0			0
3 (or more)-union elections	271	224	58	166	0	0	47	0	0	0	0	0	0
Total RD elections	33,950	10,243	7,047	1,348	213	1,640	4,451	5,862	4,133	1,122	182	425	13,394

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[1] See Glossary for definitions of terms.

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1982

Division and State [1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL CIO	Teamsters	Other national unions	Other local unions		
Maine	33	15	10	1	0	4	18	2,150	1,869	773	599	17	0	157	1,096	431
New Hampshire	13	3	2	1	0	0	10	148	125	46	25	16	0	5	79	28
Vermont	7	3	2	1	0	0	4	192	177	81	57	24	0	0	96	40
Massachusetts	163	64	34	19	1	10	99	11,152	9,715	4,329	2,419	684	232	994	5,386	3,444
Rhode Island	12	6	4	1	0	1	6	4,322	3,751	956	132	5	0	819	2,795	226
Connecticut	74	37	21	10	0	6	37	3,977	3,629	1,716	1,152	348	0	216	1,913	1,640
New England	302	128	73	33	1	21	174	21,941	19,266	7,901	4,384	1,094	232	2,191	11,365	5,809
New York	416	204	129	33	11	31	212	23,333	18,308	11,086	7,102	902	1,239	1,843	7,222	15,663
New Jersey	215	96	55	27	2	12	119	13,047	11,346	5,877	3,901	503	172	1,301	5,469	5,470
Pennsylvania	308	117	59	34	12	12	191	16,323	14,424	6,307	3,881	1,076	677	673	8,117	5,153
Middle Atlantic	939	417	243	94	25	55	522	52,703	44,078	23,270	14,884	2,481	2,088	3,817	20,808	26,286
Ohio	299	109	64	41	3	1	190	14,582	12,903	5,821	4,039	834	830	118	7,082	5,041
Indiana	124	37	24	11	0	2	87	6,168	5,538	2,216	1,662	501	14	39	3,322	1,112
Illinois	291	104	71	24	1	8	187	11,600	9,929	5,074	3,446	686	283	659	4,855	5,021
Michigan	279	112	68	27	5	12	167	14,100	11,781	5,587	3,936	862	183	606	6,194	4,004
Wisconsin	132	63	39	14	0	10	69	6,998	6,294	2,596	1,789	372	0	435	3,698	2,441
East North Central	1,125	425	266	117	9	33	700	53,448	46,445	21,294	14,872	3,255	1,310	1,857	25,151	17,619
Iowa	40	20	13	7	0	0	20	1,369	1,265	660	531	129	0	0	605	746
Minnesota	121	50	32	14	0	4	71	4,812	4,299	1,933	1,375	426	0	132	2,366	1,546
Missouri	143	60	34	23	2	1	83	8,059	7,153	3,577	2,289	1,122	7	159	3,576	3,546
North Dakota	9	1	1	0	0	0	8	205	192	81	64	17	0	0	111	8
South Dakota	9	2	0	2	0	0	7	1,145	950	170	155	15	0	0	780	6
Nebraska	30	10	5	4	0	1	20	1,329	1,205	560	225	130	0	205	645	588
Kansas	34	18	6	9	0	3	16	2,602	2,300	1,473	601	179	1	692	827	1,675
West North Central	386	161	91	59	2	9	225	19,521	17,364	8,454	5,240	2,018	8	1,188	8,910	8,115
Delaware	18	8	6	0	0	2	10	1,398	1,203	744	352	11	0	381	459	682
Maryland	71	20	8	6	2	4	51	4,459	3,804	1,458	909	146	246	157	2,346	645
District of Columbia	23	11	8	0	0	3	12	1,167	1,026	448	199	2	122	125	578	255
Virginia	53	19	14	2	0	3	34	12,603	9,978	3,947	2,617	392	10	928	6,031	2,406

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1982—Continued

Division and State [1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO	Teamsters	Other national unions	Other local unions		
West Virginia	48	24	11	8	3	2	24	2,101	1,924	858	633	92	72	61	1,066	671
North Carolina	43	19	14	5	0	0	24	6,604	6,089	2,294	1,809	329	156	0	3,795	1,042
South Carolina	27	11	10	1	0	0	16	4,477	4,026	1,354	1,174	95	85	0	2,672	356
Georgia	80	29	21	7	1	0	51	7,915	7,155	3,095	2,368	689	38	0	4,060	2,597
Florida	104	35	22	11	1	1	69	6,055	5,799	2,393	1,652	358	178	205	3,406	1,372
South Atlantic	467	176	114	40	7	15	291	46,779	41,004	16,591	11,713	2,114	907	1,857	24,413	10,026
Kentucky	87	33	10	17	4	2	54	5,597	5,124	2,211	1,147	664	173	227	2,913	1,675
Tennessee	104	32	18	11	1	2	72	8,156	7,520	3,996	2,340	582	139	935	3,524	3,151
Alabama	48	17	15	2	0	0	31	3,732	3,472	1,461	1,428	23	10	0	2,011	723
Mississippi	22	10	8	1	0	1	12	1,549	1,438	621	489	97	0	35	817	499
East South Central	261	92	51	31	5	5	169	19,034	17,554	8,289	5,404	1,366	322	1,197	9,265	6,048
Arkansas	34	9	8	0	1	0	25	3,991	3,634	1,626	1,524	97	5	0	2,008	1,715
Louisiana	62	23	12	10	0	1	39	3,282	3,003	1,376	909	286	48	133	1,627	1,017
Oklahoma	41	17	10	7	0	0	24	1,664	1,428	656	517	138	1	0	772	397
Texas	118	51	38	10	0	3	67	8,598	7,709	3,167	2,418	601	8	140	4,542	1,955
West South Central	255	100	68	27	1	4	155	17,535	15,774	6,825	5,368	1,122	62	273	8,949	5,084
Montana	51	24	15	7	1	1	27	1,255	1,107	529	312	143	19	55	578	612
Idaho	17	4	3	1	0	0	13	294	270	91	57	33	0	1	179	29
Wyoming	7	2	1	1	0	0	5	125	109	45	16	29	0	0	64	41
Colorado	57	22	20	1	0	1	35	2,478	2,166	964	711	82	76	95	1,202	805
New Mexico	29	20	12	4	0	4	9	1,458	1,275	745	186	144	0	415	530	1,059
Arizona	61	25	14	9	1	1	36	3,112	2,822	1,257	840	226	14	177	1,565	780
Utah	23	8	3	4	0	1	15	1,067	898	385	214	145	0	26	513	244
Nevada	31	17	10	4	1	2	14	3,234	2,619	1,320	722	412	19	167	1,299	1,857
Mountain	276	122	78	31	3	10	154	13,023	11,266	5,336	3,058	1,214	128	936	5,930	5,427

Washington	188	77	49	17	5	6	111	5,807	4,859	2,210	1,425	299	243	243	2,649	2,481
Oregon	91	29	18	7	2	2	62	3,495	2,933	1,286	895	247	26	118	1,647	1,076
California	710	275	168	60	13	34	435	37,419	31,076	14,047	9,408	2,611	588	1,440	17,029	11,511
Alaska	23	4	3	1	0	0	19	1,037	794	242	122	80	24	16	552	73
Hawaii	41	19	7	2	3	7	22	2,520	2,082	1,247	567	344	167	169	835	1,216
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	1,053	404	245	87	23	49	649	50,278	41,744	19,032	12,417	3,581	1,048	1,986	22,712	16,357
Puerto Rico	45	34	8	6	0	20	11	3,240	2,906	2,287	522	216	51	1,498	619	2,614
Virgin Islands	7	5	3	0	0	2	2	262	198	108	72	0	0	36	90	149
Outlying Areas	52	39	11	6	0	22	13	3,502	3,104	2,395	594	216	51	1,534	709	2,763
Total, all States and areas	5,116	2,064	1,240	525	76	223	3,052	297,764	257,599	119,387	77,984	18,461	6,156	16,836	138,212	103,534

[1] The States are grouped according to the method used by the Bureau of the Census, U.S. Department of Commerce.

Table 15B.—Geographic Distribution of Collective-Bargaining Elections Held in Cases Closed, Fiscal Year 1982

Division and State ¹	Total Elections	Number of Elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO	Teamsters	Other national unions	Other local unions		
Maine	31	15	10	1	0	4	16	1,977	1,706	725	551	17	0	157	981	431
New Hampshire	12	3	2	1	0	0	9	142	119	44	23	16	0	5	75	28
Vermont	6	3	2	1	0	0	3	138	126	65	41	24	0	0	61	40
Massachusetts	143	60	31	18	1	10	83	10,656	9,275	4,132	2,264	647	227	994	5,413	3,310
Rhode Island	11	5	3	1	0	1	6	4,310	3,740	949	125	5	0	819	2,791	214
Connecticut	67	35	19	10	0	6	32	3,605	3,272	1,542	995	346	0	201	1,730	1,392
New England	270	121	67	32	1	21	149	20,828	18,238	7,457	3,999	1,055	227	2,176	10,781	5,415
New York	363	193	121	32	11	29	170	21,302	16,695	10,273	6,533	875	1,239	1,626	6,422	14,605
New Jersey	194	91	50	27	2	12	103	12,478	10,870	5,707	3,744	498	172	1,293	5,163	5,251
Pennsylvania	266	109	55	31	12	11	157	14,625	12,965	5,730	3,569	984	677	500	7,235	4,536
Middle Atlantic	823	393	226	90	25	52	430	48,405	40,530	21,710	13,846	2,357	2,088	3,419	18,820	24,392
Ohio	241	95	55	36	3	1	146	12,154	10,729	4,951	3,404	599	830	118	5,778	4,029
Indiana	94	34	22	10	0	2	60	5,345	4,780	1,903	1,434	424	14	31	2,877	856
Illinois	246	92	60	23	1	8	154	10,055	8,599	4,390	2,861	593	277	659	4,209	4,106
Michigan	218	93	54	23	5	11	125	11,532	9,571	4,359	3,048	593	181	537	5,212	2,467
Wisconsin	110	57	35	13	0	9	53	5,895	5,318	2,135	1,433	316	0	386	3,183	1,882
East North Central	909	371	226	105	9	31	538	44,981	38,997	17,738	12,180	2,525	1,302	1,731	21,259	13,340
Iowa	34	18	11	7	0	0	16	981	901	419	290	129	0	0	482	392
Minnesota	87	44	30	10	0	4	43	3,213	2,910	1,420	1,032	297	0	91	1,490	1,205
Missouri	113	54	30	21	2	1	59	7,187	6,394	3,259	2,193	900	7	159	3,135	3,001
North Dakota	9	1	1	0	0	0	8	205	192	81	64	17	0	0	111	8
South Dakota	9	2	0	2	0	0	7	1,145	950	170	155	15	0	0	780	6
Nebraska	24	8	3	4	0	1	16	1,161	1,046	493	161	127	0	205	553	526
Kansas	29	14	5	7	0	2	15	2,124	1,842	1,042	386	120	1	535	800	1,204

West North Central	305	141	80	51	2	8	164	16,016	14,235	6,884	4,281	1,605	8	990	7,351	6,342
Delaware	17	8	6	0	0	2	9	1,389	1,194	740	352	7	0	381	454	682
Maryland	55	17	6	5	2	4	38	3,523	2,968	1,067	548	128	239	152	1,901	383
District of Columbia	20	11	8	0	0	3	9	951	837	370	199	2	122	47	467	255
Virginia	44	17	13	2	0	2	27	10,460	8,293	2,721	2,441	206	10	64	5,572	822
West Virginia	48	24	11	8	3	2	24	2,101	1,924	858	633	92	72	61	1,066	671
North Carolina	40	18	13	5	0	0	22	6,335	5,861	2,222	1,737	329	156	0	3,639	994
South Carolina	26	11	10	1	0	0	15	4,463	4,012	1,349	1,169	95	85	0	2,663	356
Georgia	64	25	17	7	1	0	39	6,578	5,972	2,518	1,839	641	38	0	3,454	1,717
Florida	95	31	20	10	0	1	64	5,612	5,404	2,139	1,580	339	15	205	3,265	1,027
South Atlantic	409	162	104	38	6	14	247	41,412	36,465	13,984	10,498	1,839	737	910	22,481	6,907
Kentucky	76	28	8	14	4	2	48	4,921	4,495	1,871	1,021	463	162	225	2,624	1,215
Tennessee	87	28	14	11	1	2	59	7,015	6,440	3,506	1,863	569	139	935	2,934	2,906
Alabama	38	12	11	1	0	0	26	2,961	2,738	1,077	1,049	18	10	0	1,661	372
Mississippi	21	10	8	1	0	1	11	1,497	1,396	611	479	97	0	35	785	499
East South Central	222	78	41	27	5	5	144	16,394	15,069	7,065	4,412	1,147	311	1,195	8,004	4,992
Arkansas	27	7	6	0	1	0	20	3,455	3,120	1,362	1,275	82	5	0	1,758	1,301
Louisiana	56	21	11	9	0	1	35	2,789	2,550	1,159	719	274	48	118	1,391	776
Oklahoma	36	17	10	7	0	0	19	1,526	1,306	612	474	137	1	0	694	397
Texas	96	42	29	10	0	3	54	7,394	6,621	2,647	1,915	584	8	140	3,974	1,387
West South Central	215	87	56	26	1	4	128	15,164	13,597	5,780	4,383	1,077	62	258	7,817	3,861
Montana	37	21	14	5	1	1	16	939	824	438	265	117	19	37	386	571
Idaho	11	4	3	1	0	0	7	171	157	58	41	16	0	1	99	29
Wyoming	5	1	0	1	0	0	4	82	73	28	1	27	0	0	45	17
Colorado	41	17	15	1	0	1	24	1,566	1,336	626	399	82	50	95	710	581
New Mexico	25	18	12	2	0	4	7	1,381	1,202	712	170	127	0	415	490	1,031
Arizona	47	22	13	7	1	1	25	2,024	1,805	799	424	187	14	174	1,006	556
Utah	18	5	2	3	0	0	13	855	718	291	158	133	0	0	427	176
Nevada	28	16	10	4	0	2	12	2,878	2,327	1,198	721	306	4	167	1,129	1,832
Mountain	212	104	69	24	2	9	108	9,896	8,442	4,150	2,179	995	87	889	4,292	4,793

Table 15B.—Geographic Distribution of Collective-Bargaining Elections Held in Cases Closed, Fiscal Year 1982—Continued

Division and State [1]	Total Elections	Number of Elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO	Teamsters	Other national unions	Other local unions		
Washington	133	66	44	12	4	6	67	4,677	3,871	1,838	1,193	184	220	241	2,033	2,280
Oregon	64	24	14	6	2	2	40	2,570	2,200	1,061	701	217	26	117	1,139	963
California	583	254	153	55	13	33	329	31,750	26,440	11,910	7,839	2,461	463	1,147	14,530	9,255
Alaska	15	2	1	1	0	0	13	637	491	136	82	24	24	6	355	35
Hawaii	39	18	7	2	2	7	21	2,498	2,060	1,235	567	344	155	169	825	1,197
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	834	364	219	76	21	48	470	42,132	35,062	16,180	10,382	3,230	888	1,680	18,882	13,730
Puerto Rico	41	31	8	4	0	19	10	3,136	2,816	2,226	522	166	51	1,487	590	2,518
Virgin Islands	7	5	3	0	0	2	2	262	198	108	72	0	0	36	90	149
Outlying areas	48	36	11	4	0	21	12	3,398	3,014	2,334	594	166	51	1,523	680	2,667
Total, all States and areas	4,247	1,857	1,099	473	72	213	2,390	258,626	223,649	103,282	66,754	15,996	5,761	14,771	120,367	86,439

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[1] The States are grouped according to the method used by the Bureau of the Census, U.S. Department of Commerce.

Table 15C.—Geographic Distribution of Decertification Elections Held in Cases Closed, Fiscal Year 1982

Division and State ¹	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no unions	Eligible employees in units choosing representation
		Total	AFL-CIO	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Maine	2	0	0	0	0	0	2	173	163	48	48	0	0	0	115	0
New Hampshire	1	0	0	0	0	0	1	6	6	2	2	0	0	0	4	0
Vermont	1	0	0	0	0	0	1	54	51	16	16	0	0	0	35	0
Massachusetts	20	4	3	1	0	0	16	496	440	197	155	37	5	0	243	134
Rhode Island	1	1	1	0	0	0	0	12	11	7	7	0	0	0	4	12
Connecticut	7	2	2	0	0	0	5	372	357	174	157	2	0	15	183	248
New England	32	7	6	1	0	0	25	1,113	1,028	444	385	39	5	15	584	394
New York	53	11	8	1	0	2	42	2,031	1,613	813	569	27	0	217	800	1,058
New Jersey	21	5	5	0	0	0	16	569	476	170	157	5	0	8	306	219
Pennsylvania	42	8	4	3	0	1	34	1,698	1,459	577	312	92	0	173	882	617
Middle Atlantic	116	24	17	4	0	3	92	4,298	3,548	1,560	1,038	124	0	398	1,988	1,894
Ohio	58	14	9	5	0	0	44	2,428	2,174	870	635	235	0	0	1,304	1,012
Indiana	30	3	2	1	0	0	27	823	758	313	228	77	0	8	445	256
Illinois	45	12	11	1	0	0	33	1,545	1,330	684	585	93	6	0	646	915
Michigan	61	19	14	4	0	1	42	2,568	2,210	1,228	888	269	2	69	982	1,537
Wisconsin	22	6	4	1	0	1	16	1,103	976	461	356	56	0	49	515	559
East North Central	216	54	40	12	0	2	162	8,467	7,448	3,556	2,692	730	8	126	3,892	4,279
Iowa	6	2	2	0	0	0	4	388	364	241	241	0	0	0	123	354
Minnesota	34	6	2	4	0	0	28	1,599	1,389	513	343	129	0	41	876	341
Missouri	30	6	4	2	0	0	24	872	759	318	96	222	0	0	441	545
North Dakota	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
South Dakota	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Nebraska	6	2	2	0	0	0	4	168	159	67	64	3	0	0	92	62
Kansas	5	4	1	2	0	1	1	478	458	431	215	59	0	157	27	471

Table 15C.—Geographic Distribution of Decertification Elections Held in Cases Closed, Fiscal Year 1982—Continued

Division and State [1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no unions	Eligible employees in units choosing representation
		Total	AFL-CIO	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
West North Central	81	20	11	8	0	1	61	3,505	3,129	1,570	959	413	0	198	1,559	1,773
Delaware	1	0	0	0	0	0	1	9	9	4	0	4	0	0	5	0
Maryland	16	3	2	1	0	0	13	936	836	391	361	18	7	5	445	262
District of Columbia	3	0	0	0	0	0	3	216	189	78	0	0	0	78	111	0
Virginia	9	2	1	0	0	1	7	2,143	1,685	1,226	176	186	0	864	459	1,584
West Virginia	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
North Carolina	3	1	1	0	0	0	2	269	228	72	72	0	0	0	156	48
South Carolina	1	0	0	0	0	0	1	14	14	5	5	0	0	0	9	0
Georgia	16	4	4	0	0	0	12	1,337	1,183	577	529	48	0	0	606	880
Florida	9	4	2	1	1	0	5	443	395	254	72	19	163	0	141	345
South Atlantic	58	14	10	2	1	1	44	5,367	4,539	2,607	1,215	275	170	947	1,982	3,119
Kentucky	11	5	2	3	0	0	6	676	629	340	126	201	11	2	289	460
Tennessee	17	4	4	0	0	0	13	1,141	1,080	490	477	13	0	0	590	245
Alabama	10	5	4	1	0	0	5	771	734	384	379	5	0	0	350	351
Mississippi	1	0	0	0	0	0	1	52	42	10	10	0	0	0	32	0
West South Central	39	14	10	4	0	0	25	2,640	2,485	1,224	992	219	11	2	1,261	1,056
Arkansas	7	2	2	0	0	0	5	536	514	264	249	15	0	0	250	414
Louisiana	6	2	1	1	0	0	4	493	453	217	190	12	0	15	236	241
Oklahoma	5	0	0	0	0	0	5	138	122	44	43	1	0	0	78	0
Texas	22	9	9	0	0	0	13	1,204	1,088	520	503	17	0	0	568	568
West South Central	40	13	12	1	0	0	27	2,371	2,177	1,045	985	45	0	15	1,132	1,223

Montana	14	3	1	2	0	0	11	316	283	91	47	26	0	18	192	41
Idaho	6	0	0	0	0	0	6	123	113	33	16	17	0	0	80	0
Wyoming	2	1	1	0	0	0	1	43	36	17	15	2	0	0	19	24
Colorado	16	5	5	0	0	0	11	912	830	338	312	0	26	0	492	224
New Mexico	4	2	0	2	0	0	2	77	73	33	16	17	0	0	40	28
Arizona	14	3	1	2	0	0	11	1,088	1,017	458	416	39	0	3	559	224
Utah	5	3	1	1	0	1	2	212	180	94	56	12	0	26	86	68
Nevada	3	1	0	0	1	0	2	356	292	122	1	106	15	0	170	25
Mountain	64	18	9	7	1	1	46	3,127	2,824	1,186	879	219	41	47	1,638	634
Washington	55	11	5	5	1	0	44	1,130	988	372	232	115	23	2	616	201
Oregon	27	5	4	1	0	0	22	925	733	225	194	30	0	1	508	113
California	127	21	15	5	0	1	106	5,669	4,636	2,137	1,569	150	125	293	2,499	2,256
Alaska	8	2	2	0	0	0	6	400	303	106	40	56	0	10	197	38
Hawaii	2	1	0	0	1	0	1	22	22	12	0	0	12	0	10	19
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	219	40	26	11	2	1	179	8,146	6,682	2,852	2,035	351	160	306	3,830	2,627
Puerto Rico	4	3	0	2	0	1	1	104	90	61	0	50	0	11	29	96
Virgin Islands	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Outlying Areas	4	3	0	2	0	1	1	104	90	61	0	50	0	11	29	96
Total, all States and areas	869	207	141	52	4	10	662	39,138	33,950	16,105	11,180	2,465	395	2,065	17,845	17,095

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[1] The States are grouped according to the method used by the Bureau of the Census, U.S. Department of Commerce.

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1982

Industrial group [1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Food and kindred products	223	95	44	37	1	13	128	14,967	13,032	7,494	4,226	1,477	181	1,610	5,538	8,547
Textile mill products	48	19	13	5	0	1	29	8,616	7,902	4,063	2,964	160	0	939	3,839	3,065
Apparel and other finished products made from fabric and similar materials	31	12	12	0	0	0	19	2,513	2,265	997	890	81	0	26	1,268	974
Lumber and wood products (except furniture)	85	32	19	7	1	5	53	5,124	4,606	2,102	1,487	342	9	264	2,504	1,624
Furniture and fixtures	55	23	17	4	0	2	32	3,374	2,983	1,124	804	249	0	71	1,859	808
Paper and allied products	49	17	13	1	0	3	32	2,732	2,485	1,087	973	53	7	54	1,398	658
Printing, publishing, and allied products	108	39	28	2	0	9	69	4,607	4,105	2,232	1,795	168	7	262	1,873	2,235
Chemicals and allied products	98	37	19	14	0	4	61	9,185	8,375	3,616	2,555	346	83	632	4,759	2,224
Petroleum refining and related industries	32	15	9	5	0	1	17	1,287	1,208	546	436	82	5	23	662	369
Rubber and miscellaneous plastic products	84	21	14	6	0	1	63	6,696	6,184	2,441	1,777	569	26	69	3,743	1,552
Leather and leather products	19	7	4	1	0	2	12	3,385	3,052	1,253	651	237	0	365	1,799	1,204
Stone, clay, glass, and concrete products	88	32	17	11	0	4	56	3,440	3,175	1,791	1,266	314	0	211	1,384	1,722
Primary metal industries	106	46	36	8	1	1	60	7,994	6,943	2,931	2,550	325	8	48	4,012	1,959
Fabricated metal products (except machinery and transportation equipment)	161	52	40	10	2	0	109	7,194	6,615	2,955	2,151	422	245	137	3,660	1,637
Machinery (except electrical)	184	72	45	18	2	7	112	13,784	12,216	4,628	2,595	789	45	1,199	7,588	3,073
Electrical and electronic machinery, equipment, and supplies	105	40	29	6	2	3	65	12,855	11,619	5,165	3,723	562	603	277	6,454	4,163
Aircraft and parts	77	27	19	6	1	1	50	9,606	8,592	4,484	3,615	430	21	418	4,108	2,769
Ship and boat building and repairing	13	3	1	0	1	1	10	1,569	1,457	620	407	70	139	4	837	273
Automotive and other transportation equipment	10	3	3	0	0	0	7	866	788	311	304	7	0	0	477	116
Measuring, analyzing, and controlling instruments; photographic, medical, and optical goods; watches and clocks	42	14	10	3	0	1	28	3,107	2,827	1,160	938	209	0	13	1,667	660
Miscellaneous manufacturing industries	236	75	49	19	1	6	161	12,822	11,041	4,436	2,751	957	104	624	6.605	2.796
Manufacturing	1,854	681	441	163	12	65	1,173	135,723	121,470	55,436	38,858	7,849	1,483	7,246	66,034	42,338

Metal mining	8	2	2	0	0	0	6	455	423	108	94	11	0	3	315	15
Coal mining	47	19	4	2	11	2	28	4,279	3,923	1,958	1,094	47	381	436	1,965	997
Oil and gas extraction	7	2	2	0	0	0	5	218	188	65	42	23	0	0	123	50
Mining and quarrying of nonmetalic minerals (except fuels)	13	4	4	0	0	0	9	453	412	130	122	8	0	0	282	36
Mining	75	27	12	2	11	2	48	5,405	4,946	2,261	1,352	89	381	439	2,685	1,098
Construction	219	80	57	8	6	9	139	10,989	8,240	2,796	1,933	411	139	313	5,444	1,919
Wholesale trade	458	173	71	86	4	12	285	18,204	16,273	7,062	3,863	2,317	158	724	9,211	4,858
Retail trade	626	218	145	58	3	12	408	20,422	17,477	7,641	5,804	1,300	90	447	9,836	6,694
Finance, insurance, and real estate	82	38	26	8	1	3	44	3,042	2,674	1,212	685	263	217	47	1,462	1,111
U.S. Postal Service	2	1	1	0	0	0	1	8	8	3	3	0	0	0	5	4
Local and suburban transit and interurban highway passenger transportation	63	30	16	8	0	6	33	4,493	3,474	1,858	981	335	138	404	1,616	2,339
Motor freight transportation and warehousing	272	114	17	93	3	1	158	7,104	6,342	2,772	439	2,120	181	32	3,570	1,999
Water transportation	28	16	10	2	3	1	12	773	678	297	223	39	25	10	381	374
Other transportation	61	28	9	17	0	2	33	3,034	2,425	1,612	310	427	1	874	813	2,151
Communication	154	76	62	4	0	10	78	4,531	3,987	2,061	1,740	77	8	236	1,926	2,397
Electric, gas, and sanitary services	81	34	23	8	0	3	47	4,699	4,204	2,400	1,603	259	311	227	1,804	2,238
Transportation, communication, and other utilities	659	298	137	132	6	23	361	24,634	21,110	11,000	5,296	3,257	664	1,783	10,110	11,498
Hotels, rooming houses, camps, and other lodging places	89	37	26	6	0	5	52	5,920	4,887	2,389	1,426	572	115	276	2,498	2,523
Personal services	47	23	14	6	0	3	24	1,303	1,113	579	308	157	0	114	534	622
Automotive repair, services, and garages	73	39	19	20	0	0	34	1,320	1,190	631	300	309	0	22	559	553
Motion pictures	13	6	3	0	2	1	7	316	284	111	50	0	4	57	173	43
Amusement and recreation services (except motion pictures)	47	17	14	2	1	0	30	2,805	2,328	507	432	19	56	0	1,821	216
Health services	473	232	153	9	22	48	241	48,596	40,161	19,771	12,333	1,003	2,385	4,050	20,390	20,930
Educational services	36	15	6	2	2	5	21	2,645	2,188	1,053	740	169	30	114	1,135	806
Membership organizations	21	14	8	4	0	2	7	1,476	905	572	470	45	29	28	333	949
Business services	233	98	59	14	4	21	135	9,458	8,017	3,775	2,062	453	375	885	4,242	3,541
Miscellaneous repair services	26	11	5	2	2	2	15	722	673	328	219	53	24	32	345	293
Museums, art galleries, botanical and zoological gardens	1	1	1	0	0	0	0	119	107	76	76	0	0	0	31	119
Legal services	11	8	3	0	0	5	3	213	186	108	60	0	6	42	78	154

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1982—Continued

Industrial group [1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Social services	43	33	27	1	0	5	10	3,033	2,199	1,500	1,271	19	0	210	699	2,576
Miscellaneous services	14	8	6	2	0	0	6	965	766	383	234	149	0	0	383	422
Services	1,127	542	344	68	33	97	585	78,891	65,004	31,783	19,981	2,948	3,024	5,830	33,221	33,744
Public administration	14	6	6	0	0	0	8	446	397	193	159	27	0	7	204	265
Total, all industrial groups	5,116	2,064	1,240	525	76	223	3,052	297,764	257,599	119,387	77,934	18,461	6,156	16,836	138,212	103,534

[1] Source: Standard Industrial Classification, Statistical Policy Division, Office of Management and Budget, Washington, D.C., 1972.

Table 17.—Size of Units in Representation Cases Closed, Fiscal Year 1982

Size of unit (number of employees)	Number eligible to vote	Total elections	Percent of total	Cumulative percent of total	Elections in which representation rights were won by								Elections in which no representative was chosen	
					AFL–CIO unions		Teamsters		Other national unions		Other local unions			
					Number	Percent by size class	Number	Percent by size class	Number	Percent by size class	Number	Percent by size class	Number	Percent by size class
	A. Certification elections (RC and RM)													
Total RC and RM elections	258,626	4,247	100.0	....	1,099	100.0	473	100.0	72	100.0	213	100.0	2,390	100.0
Under 10	5,688	1,025	24.1	24.1	287	26.1	184	38.9	19	26.4	38	17.8	497	20.8
10 to 19	12,961	923	21.7	45.8	253	23.0	140	29.6	17	23.6	53	24.9	460	19.2
20 to 29	12,679	528	12.4	58.2	146	13.2	61	12.9	6	8.3	21	9.9	294	12.3
30 to 39	10,961	322	7.6	65.8	88	8.0	29	6.1	4	5.6	16	7.5	185	7.7
40 to 49	10,839	247	5.8	71.6	66	6.0	11	2.3	6	8.3	16	7.5	148	6.2
50 to 59	9,552	177	4.2	75.8	48	4.4	6	1.3	0	....	11	5.2	112	4.7
60 to 69	8,674	135	3.2	79.0	33	3.0	8	1.7	2	2.8	6	2.9	86	3.6
70 to 79	8,164	110	2.6	81.6	28	2.5	6	1.3	2	2.8	3	1.4	71	3.0
80 to 89	7,633	90	2.1	83.7	21	1.9	6	1.3	0	....	5	2.3	58	2.4
90 to 99	8,294	88	2.1	85.8	23	2.1	1	0.2	1	1.4	3	1.4	60	2.5
100 to 109	5,443	52	1.2	87.0	6	0.5	4	0.9	1	1.4	2	0.9	39	1.6
110 to 119	5,482	48	1.1	88.1	13	1.2	1	0.2	0	....	4	1.9	30	1.3
120 to 129	5,324	43	1.0	89.1	8	0.7	0	....	1	1.4	2	0.9	32	1.3
130 to 139	5,648	42	1.0	90.1	7	0.6	4	0.8	0	....	3	1.4	28	1.2
140 to 149	4,777	33	0.8	90.9	5	0.5	0	....	0	....	1	0.5	27	1.1
150 to 159	4,488	29	0.7	91.6	4	0.4	0	....	0	....	2	0.9	23	1.0
160 to 169	4,451	27	0.6	92.2	7	0.6	0	....	0	....	1	0.5	19	0.8
170 to 179	2,774	16	0.4	92.6	5	0.5	0	....	1	1.4	0	....	10	0.4
180 to 189	4,408	24	0.6	93.2	3	0.3	0	....	0	....	2	0.9	19	0.8
190 to 199	2,157	11	0.3	93.5	1	0.1	0	....	0	....	2	0.9	8	0.3
200 to 299	30,332	126	3.0	96.5	22	2.0	9	1.9	6	8.3	11	5.2	78	3.3
300 to 399	22,073	66	1.6	98.1	11	1.0	1	0.2	3	4.1	5	2.3	46	1.9
400 to 499	15,388	35	0.8	98.9	4	0.4	1	0.2	2	2.8	4	1.9	24	1.0
500 to 599	8,251	15	0.4	99.3	2	0.2	1	0.2	0	....	0	....	12	0.5
600 to 799	11,428	16	0.4	99.7	5	0.5	0	....	1	1.4	0	....	10	0.4
800 to 999	4,969	6	0.1	99.8	1	0.1	0	....	0	....	1	0.5	4	0.2
,000 to 1,999	12,925	9	0.2	100.0	2	0.2	0	....	0	....	1	0.5	6	0.3
2,000 to 2,999	4,548	2	0.0	100.0	0	....	0	....	0	....	0	....	2	0.1
3,000 to 9,999	8,315	2	0.0	100.0	0	....	0	....	0	....	0	....	2	0.1

Table 17.—Size of Units in Representation Cases Closed, Fiscal Year 1982 [1]—Continued

Size of unit (number of employees)	Number eligible to vote	Total elections	Percent of total	Cumulative percent of total	Elections in which representation rights were won by								Elections in which no representative was chosen	
					AFL–CIO unions		Teamsters		Other national unions		Other local unions			
					Number	Percent by size class	Number	Percent by size class	Number	Percent by size class	Number	Percent by size class	Number	Percent by size class
	B. Decertification elections (RD)													
Total RD elections	39,138	869	100.0	....	141	100.0	52	100.0	4	100.0	10	100.0	662	100.0
Under 10	1,399	246	28.3	28.3	7	5.0	11	21.2	0	....	0	....	228	34.4
10 to 19	3,067	217	25.0	53.3	26	18.4	13	25.0	1	25.0	2	20.0	175	26.4
20 to 29	2,614	108	12.4	65.7	21	14.9	9	17.3	1	25.0	2	20.0	75	11.3
30 to 39	2,218	64	7.4	73.1	15	10.6	4	7.7	1	25.0	0	....	44	6.6
40 to 49	2,185	50	5.8	78.9	16	11.4	3	5.8	0	....	1	10.0	30	4.5
50 to 59	1,784	33	3.8	82.7	5	3.6	4	7.7	0	....	0	....	24	3.6
60 to 69	1,682	26	3.0	85.7	11	7.8	1	1.9	0	....	1	10.0	13	2.0
70 to 79	1,030	14	1.6	87.3	2	1.4	1	1.9	0	....	0	....	11	1.7
80 to 89	1,356	16	1.8	89.1	4	2.8	1	1.9	0	....	1	10.0	10	1.5
90 to 99	865	9	1.0	90.1	2	1.4	0	....	0	....	0	....	7	1.1
100 to 109	528	5	0.6	90.7	0	....	0	....	0	....	0	....	5	0.8
110 to 119	568	5	0.6	91.3	1	0.7	0	....	0	....	0	....	4	0.6
120 to 129	621	5	0.6	91.9	1	0.7	0	....	0	....	0	....	4	0.6
130 to 139	799	6	0.7	92.6	3	2.1	1	1.9	0	....	0	....	2	0.3
140 to 149	576	4	0.5	93.1	2	1.4	0	....	0	....	0	....	2	0.3
150 to 159	309	2	0.2	93.3	0	....	1	1.9	0	....	0	....	1	0.2
160 to 169	655	4	0.5	93.8	2	1.4	0	....	0	....	0	....	2	0.3
170 to 199	1,972	11	1.2	95.0	1	0.7	0	....	0	....	0	....	10	1.5
200 to 299	5,930	25	2.8	97.8	13	9.3	2	3.9	1	25.0	1	10.0	8	1.2
300 to 499	5,330	14	1.6	99.4	6	4.3	1	1.9	0	....	1	10.0	6	0.9
500 to 799	2,366	4	0.5	99.9	3	2.1	0	....	0	....	0	....	1	0.2
800 and over	1,284	1	0.1	100.0	0	....	0	....	0	....	1	10.0	0	....

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[1] See Glossary for definitions of terms.

Table 18.—Distribution of Unfair Labor Practice Situations Received, by Number of Employees in Establishments, Fiscal Year 1982 [1]

Size of establishment (number of employees)	Total number of situations	Total		Type of situations																	
				CA		CB		CC		CD		CE		CG		CP		CA–CB combinations		Other C combinations	
		Percent of all situations	Cumulative percent of all situations	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class
Total	[2] 34,229	100.0	......	24,716	100.0	6,247	100.0	1,176	100.0	349	100.0	49	100.0	33	100.0	299	100.0	1,167	100.0	193	100.0
Under 10	9,391	27.4	27.4	6,382	25.8	1,903	30.5	514	43.6	128	36.6	23	47.0	7	21.2	129	43.1	221	18.9	84	43.6
10–19	3,179	9.3	36.7	2,455	9.9	377	6.0	145	12.3	48	13.8	9	18.5	1	3.0	57	19.1	59	5.1	28	14.6
20–29	2,600	7.6	44.3	2,043	8.3	349	5.6	85	7.2	28	8.0	2	4.1	0	......	27	9.0	54	4.6	12	6.2
30–39	1,699	5.0	49.3	1,327	5.4	231	3.7	37	3.1	22	6.3	6	12.3	0	......	16	5.4	48	4.1	12	6.2
40–49	1,198	3.5	52.8	930	3.8	173	2.8	31	2.6	9	2.6	1	2.0	0	......	8	2.7	38	3.3	8	4.1
50–59	1,418	4.1	56.9	1,047	4.2	241	3.9	54	4.6	15	4.3	0	......	2	6.1	10	3.3	47	4.0	2	1.0
60–69	817	2.4	59.3	657	2.7	96	1.5	22	1.9	5	1.4	0	......	5	15.2	8	2.7	21	1.8	3	1.6
70–79	792	2.3	61.6	595	2.4	127	2.0	31	2.6	6	1.7	0	......	0	......	7	2.3	24	2.1	2	1.0
80–89	532	1.6	63.2	416	1.7	75	1.2	14	1.2	1	0.3	0	......	1	3.0	6	2.0	16	1.4	3	1.6
90–99	262	0.8	64.0	218	0.9	28	0.4	5	0.4	1	0.3	0	......	0	......	2	0.7	11	0.9	2	1.0
100–109	1,388	4.1	68.1	957	3.9	287	4.6	45	3.8	12	3.4	1	2.0	1	3.0	7	2.3	68	5.8	10	5.2
110–119	208	0.6	68.7	173	0.7	23	0.4	6	0.5	1	0.3	0	......	1	3.0	0	......	4	0.3	0	......
120–129	402	1.2	69.9	322	1.3	55	0.9	7	0.6	2	0.6	1	2.0	0	......	0	......	13	1.1	2	1.0
130–139	170	0.5	70.4	135	0.5	21	0.3	1	0.1	0	......	1	2.0	0	......	1	0.3	10	0.9	1	0.5
140–149	135	0.4	70.8	106	0.4	21	0.3	3	0.3	0	......	0	......	0	......	0	......	5	0.4	0	......
150–159	638	1.9	72.7	473	1.9	119	1.9	13	1.1	1	0.3	0	......	0	......	1	0.3	31	2.7	0	......
160–169	147	0.4	73.1	121	0.5	20	0.3	3	0.3	0	......	0	......	0	......	0	......	3	0.3	0	......
170–179	157	0.5	73.6	133	0.5	16	0.3	1	0.1	1	0.3	0	......	0	......	2	0.7	4	0.3	0	......
180–189	135	0.4	74.0	106	0.4	20	0.3	5	0.4	0	......	0	......	0	......	0	......	4	0.3	0	......
190–199	48	0.1	74.1	39	0.2	5	0.1	1	0.1	0	......	0	......	0	......	0	......	3	0.3	0	......
200–299	1,860	5.4	79.5	1,344	5.4	360	5.8	29	2.5	19	5.4	2	4.1	1	3.0	5	1.7	96	8.2	4	2.1
300–399	1,127	3.3	82.8	780	3.2	257	4.1	13	1.1	8	2.3	1	2.0	0	......	2	0.7	63	5.4	3	1.6
400–499	649	1.9	84.7	464	1.9	126	2.0	9	0.8	7	2.0	1	2.0	2	6.1	0	......	36	3.1	4	2.1
500–599	705	2.1	86.8	463	1.9	167	2.7	16	1.4	6	1.7	0	......	2	6.1	2	0.7	48	4.1	1	0.5
600–699	332	1.0	87.8	241	1.0	68	1.1	8	.7	0	......	0	......	0	......	0	......	14	1.2	1	0.5
700–799	252	0.7	88.5	179	0.7	56	0.9	0	......	0	......	0	......	0	......	2	0.7	14	1.2	1	0.5
800–899	229	0.7	89.2	153	0.6	51	0.8	2	0.2	1	0.3	0	......	0	......	0	......	20	1.7	2	1.0
900–999	135	0.4	89.6	86	0.3	42	0.7	1	0.1	2	0.6	0	......	1	3.0	0	......	3	0.3	0	......
1,000–1,999	1,187	3.5	93.1	792	3.2	298	4.8	20	1.7	10	2.9	0	......	2	6.1	0	......	61	5.2	4	2.1
2,000–2,999	558	1.6	94.7	362	1.5	158	2.5	8	0.7	2	0.6	0	......	3	9.1	0	......	24	2.1	1	0.5
3,000–3,999	378	1.1	95.8	271	1.1	90	1.4	1	0.1	1	0.3	0	......	0	......	0	......	15	1.3	0	......
4,000–4,999	186	0.5	96.3	111	0.4	60	1.0	3	0.3	0	......	0	......	1	3.0	0	......	11	0.9	0	......
5,000–9,999	436	1.2	97.5	257	1.0	128	2.0	6	0.5	1	0.3	0	......	0	......	0	......	43	3.7	1	0.5
Over 9,999	879	2.5	100.0	583	2.4	199	3.2	37	3.1	12	3.4	1	2.0	3	9.1	7	2.3	35	3.0	2	1.0

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[1] See Glossary for definitions of terms.

[2] Based on revised situation count which absorbs companion cases, cross-filing, and multiple filings.

Table 19.—Litigation for Enforcement and/or Review of Board Orders, Fiscal Year 1982 and Cumulative Totals, Fiscal Years 1936–1982

	Fiscal year 1982									July 5, 1935 to Sept. 30, 1982	
	Number of proceedings [1]					Percentages					
	Total	Vs. employers only	Vs. unions only	Vs. both employers and unions	Board dismissal [2]	Vs. employers only	Vs. unions only	Vs. both employers and unions	Board dismissal [2]	Number	Percent
Proceedings decided by U.S. courts of appeals	456	408	30	3	15						
On petitions for review and/or enforcement	424	380	26	3	15	100.0	100.0	100.0	100.0	8,569	100.0
Board orders affirmed in full	273	239	18	2	14	62.9	69.3	66.7	93.3	5,449	63.6
Board orders affirmed with modification	45	44	1	0	0	11.6	3.8			1,307	15.3
Remanded to Board	33	28	4	1	0	7.3	15.4	33.3		406	4.7
Board orders partially affirmed and partially remanded	20	19	1	0	0	5.0	3.8			151	1.7
Board orders set aside	53	50	2	0	1	13.2	7.7		6.7	1,256	14.7
On petitions for contempt	32	28	4	0	0	100.0	100.0				
Compliance after filing of petition before court order	5	5	0	0	0	17.9					
Court orders holding respondent in contempt	19	15	4	0	0	53.6	100.0				
Court orders directing compliance without contempt adjudication	6	6	0	0	0	21.4					
Contempt petitions withdrawn without compliance	0	0	0	0	0						
Court orders denying petition	2	2	0	0	0	7.1					
Proceedings decided by U.S. Supreme Court [3]	3	2	1	0	0	100.0	100.0			234	100.0
Board orders affirmed in full	3	2	1	0	0	100.0	100.0			141	60.3
Board orders affirmed with modification	0	0	0	0	0					17	7.3
Board orders set aside	0	0	0	0	0					38	16.2
Remanded to Board	0	0	0	0	0					19	8.2
Remanded to court of appeals	0	0	0	0	0					16	6.8
Board's request for remand or modification of enforcement order denied	0	0	0	0	0					1	0.4
Contempt cases remanded to court of appeals	0	0	0	0	0					1	0.4
Contempt cases enforced	0	0	0	0	0					1	0.4

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[1] "Proceedings" are comparable to "cases" reported in annual reports prior to fiscal 1964. This term more accurately describes the data inasmuch as a single "proceeding" often includes more than one "case." See Glossary for definitions of terms.

[2] A proceeding in which the Board had entered an order dismissing the complaint and the charging party appealed such dismissal in the courts of appeals.

[3] The Board appeared as "amicus curiae" in two cases.

Table 19A.—Proceedings Decided by Circuit Courts of Appeals on Petitions for Enforcement and/or Review of Board Orders, Fiscal Year 1982, Compared With 5-Year Cumulative Totals, Fiscal Years 1977 Through 1981 [1]

<table>
<tr><th rowspan="3">Circuit courts of appeals (headquarters)</th><th rowspan="3">Total fiscal year 1982</th><th rowspan="3">Total fiscal years 1977-1981</th><th colspan="4">Affirmed in full</th><th colspan="4">Modified</th><th colspan="4">Remanded in full</th><th colspan="4">Affirmed in part and remanded in part</th><th colspan="4">Set aside</th></tr>
<tr><th colspan="2">Fiscal Year 1982</th><th colspan="2">Cumulative fiscal years 1977-1981</th><th colspan="2">Fiscal Year 1982</th><th colspan="2">Cumulative fiscal years 1977-1981</th><th colspan="2">Fiscal Year 1982</th><th colspan="2">Cumulative fiscal years 1977-1981</th><th colspan="2">Fiscal Year 1982</th><th colspan="2">Cumulative fiscal years 1977-1981</th><th colspan="2">Fiscal Year 1982</th><th colspan="2">Cumulative fiscal years 1977-1981</th></tr>
<tr><th>Number</th><th>Percent</th><th>Number</th><th>Percent</th><th>Number</th><th>Percent</th><th>Number</th><th>Percent</th><th>Number</th><th>Percent</th><th>Number</th><th>Percent</th><th>Number</th><th>Percent</th><th>Number</th><th>Percent</th><th>Number</th><th>Percent</th><th>Number</th><th>Percent</th></tr>
<tr><td>Total all circuits</td><td>424</td><td>1,882</td><td>273</td><td>64.4</td><td>1,225</td><td>65.1</td><td>45</td><td>10.6</td><td>234</td><td>12.4</td><td>33</td><td>7.8</td><td>95</td><td>5.1</td><td>20</td><td>4.7</td><td>34</td><td>1.8</td><td>53</td><td>12.5</td><td>294</td><td>15.6</td></tr>
<tr><td>1. Boston, Mass</td><td>19</td><td>97</td><td>8</td><td>42.1</td><td>64</td><td>66.0</td><td>6</td><td>31.6</td><td>15</td><td>15.5</td><td>2</td><td>10.5</td><td>2</td><td>2.0</td><td>1</td><td>5.3</td><td>3</td><td>3.1</td><td>2</td><td>10.5</td><td>13</td><td>13.4</td></tr>
<tr><td>2 New York, N.Y</td><td>30</td><td>133</td><td>23</td><td>76.7</td><td>81</td><td>60.9</td><td>1</td><td>3.3</td><td>21</td><td>15.8</td><td>2</td><td>6.7</td><td>6</td><td>4.5</td><td>1</td><td>3.3</td><td>2</td><td>1.5</td><td>3</td><td>10.0</td><td>23</td><td>17.3</td></tr>
<tr><td>3. Phila., Pa</td><td>42</td><td>183</td><td>25</td><td>59.5</td><td>129</td><td>70.5</td><td>3</td><td>7.1</td><td>18</td><td>9.8</td><td>5</td><td>11.9</td><td>11</td><td>6.0</td><td>2</td><td>4.8</td><td>3</td><td>1.7</td><td>7</td><td>16.7</td><td>22</td><td>12.0</td></tr>
<tr><td>4. Richmond, Va</td><td>40</td><td>140</td><td>22</td><td>55.0</td><td>84</td><td>60.0</td><td>8</td><td>20.0</td><td>23</td><td>16.4</td><td>1</td><td>2.5</td><td>9</td><td>6.4</td><td>0</td><td>0.0</td><td>2</td><td>1.4</td><td>9</td><td>22.5</td><td>22</td><td>15.8</td></tr>
<tr><td>5. New Orleans, La</td><td>28</td><td>241</td><td>20</td><td>71.4</td><td>153</td><td>63.5</td><td>2</td><td>7.1</td><td>35</td><td>14.5</td><td>1</td><td>3.6</td><td>9</td><td>3.7</td><td>1</td><td>3.6</td><td>5</td><td>2.1</td><td>4</td><td>14.3</td><td>39</td><td>16.2</td></tr>
<tr><td>6. Cincinnati, Ohio</td><td>65</td><td>247</td><td>41</td><td>63.1</td><td>158</td><td>64.0</td><td>8</td><td>12.3</td><td>29</td><td>11.7</td><td>7</td><td>10.8</td><td>10</td><td>4.1</td><td>0</td><td>0.0</td><td>3</td><td>1.2</td><td>9</td><td>13.8</td><td>47</td><td>19.0</td></tr>
<tr><td>7. Chicago, Ill</td><td>43</td><td>177</td><td>25</td><td>58.1</td><td>98</td><td>55.4</td><td>7</td><td>16.3</td><td>32</td><td>18.1</td><td>3</td><td>7.0</td><td>3</td><td>3.9</td><td>2</td><td>4.6</td><td>1</td><td>0.6</td><td>6</td><td>14.0</td><td>39</td><td>22.0</td></tr>
<tr><td>8. St. Louis, Mo</td><td>25</td><td>135</td><td>15</td><td>60.0</td><td>90</td><td>66.7</td><td>5</td><td>20.0</td><td>18</td><td>13.3</td><td>3</td><td>12.0</td><td>2</td><td>1.5</td><td>2</td><td>8.0</td><td>2</td><td>1.5</td><td>0</td><td>0.0</td><td>23</td><td>17.0</td></tr>
<tr><td>9. San Francisco, Ca</td><td>82</td><td>361</td><td>58</td><td>70.7</td><td>256</td><td>70.9</td><td>3</td><td>3.7</td><td>27</td><td>7.5</td><td>2</td><td>2.4</td><td>26</td><td>7.2</td><td>11</td><td>13.4</td><td>5</td><td>1.4</td><td>8</td><td>9.8</td><td>47</td><td>13.0</td></tr>
<tr><td>10. Denver, Colo</td><td>14</td><td>67</td><td>11</td><td>78.6</td><td>41</td><td>61.2</td><td>0</td><td>0.0</td><td>7</td><td>10.4</td><td>1</td><td>7.1</td><td>6</td><td>9.0</td><td>0</td><td>0.0</td><td>3</td><td>4.5</td><td>2</td><td>14.3</td><td>10</td><td>14.9</td></tr>
<tr><td>11. Atlanta, Ga. [2]</td><td>13</td><td>......</td><td>9</td><td>69.2</td><td>......</td><td>......</td><td>2</td><td>15.4</td><td>......</td><td>......</td><td>0</td><td>0.0</td><td>......</td><td>......</td><td>0</td><td>0.0</td><td>......</td><td>......</td><td>2</td><td>15.4</td><td>......</td><td>......</td></tr>
<tr><td>Washington, D.C</td><td>23</td><td>101</td><td>16</td><td>69.6</td><td>71</td><td>70.3</td><td>0</td><td>0.0</td><td>9</td><td>8.9</td><td>6</td><td>26.1</td><td>7</td><td>6.9</td><td>0</td><td>0.0</td><td>5</td><td>5.0</td><td>1</td><td>4.3</td><td>9</td><td>8.9</td></tr>
</table>

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[1] Percentages are computed horizontally by current fiscal year and total fiscal years.

[2] Commenced operations October 1, 1981.

Table 20.—Injunction Litigation Under Section 10(e), 10(j), and 10(l), Fiscal Year 1982

	Total proceedings	Injunctions proceedings		Total dispositions	Disposition of injunctions						Pending in district court Sept. 30, 1982
		Pending in district court Oct. 1, 1981	Filed in district court fiscal year 1982		Granted	Denied	Settled	With-drawn	Dismissed	Inactive	
Under Sec. 10(e) Total	[1] 5	0	5	5	5	0	0	0	0	0	0
Under Sec. 10(j) Total	52	9	43	52	23	8	15	4	2	0	0
8(a)(1)	1	0	1	6	1	2	1	2	0	0	0
8(a)(1)(2)	1	0	1	1	1	0	0	0	0	0	0
8(a)(1)(3)	16	3	13	15	8	3	3	1	0	0	0
8(a)(1)(4)	1	0	1	1	1	0	0	0	0	0	0
8(a)(1)(5)	8	1	7	7	6	0	1	0	0	0	0
8(a)(1)(2)(5)	2	0	2	2	0	0	2	0	0	0	0
8(a)(1)(3)(4)	3	1	2	2	0	0	1	0	1	0	0
8(a)(1)(3)(5)	13	3	10	10	3	2	4	0	1	0	0
8(a)(1)(2)(3)(5)	1	0	1	2	0	1	0	1	0	0	0
8(a)(1)(3)(4)(5)	1	1	0	1	0	0	1	0	0	0	0
8(b)(1)	4	0	4	4	2	0	2	0	0	0	0
8(b)(3)	1	0	1	1	1	0	0	0	0	0	0
Under Sec. 10(l) Total	117	17	100	117	65	6	38	1	5	2	0
8(b)(4)(B)	54	11	43	63	32	6	21	1	2	1	0
8(b)(4)(B)(C)	5	0	5	2	2	0	0	0	0	0	0
8(b)(4)(B); 8(b)(4)(D)	5	0	5	0	0	0	0	0	0	0	0
8(b)(4)(B); 8(e)	1	1	0	0	0	0	0	0	0	0	0
8(b)(4)(B)(C); 8(b)(7)(C)	2	0	2	0	0	0	0	0	0	0	0
8(b)(4)(D)	24	0	24	26	18	0	7	0	0	1	0
8(b)(4)(D); 8(b)(4)(B)	1	0	1	0	0	0	0	0	0	0	0
8(b)(7)(A); 8(b)(4)(D)	1	0	1	0	0	0	0	0	0	0	0
8(b)(7)(A)	4	1	3	4	2	0	1	0	1	0	0
8(b)(7)(B)(D)	2	2	0	0	0	0	0	0	0	0	0
8(b)(7)(C)	17	1	16	22	11	0	9	0	2	0	0
8(b)(7)(D)	1	1	0	0	0	0	0	0	0	0	0

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[1] In courts of appeals.

Table 21.—Miscellaneous Litigation Involving NLRB; Outcome of Proceedings in Which Court Decision Issued in Fiscal Year 1982

Type of litigation	Number of proceedings								
	Total—all courts			In courts of appeals			In district courts		
	Number decided	Court determination		Number decided	Court determination		Number decided	Court determination	
		Upholding Board position	Contrary to Board position		Upholding Board position	Contrary to Board position		Upholding Board position	Contrary to Board position
Totals—all types	74	68	6	33	31	2	41	37	4
NLRB-initiated actions or interventions	21	19	2	12	10	2	9	9	0
To enforce subpena	5	5	0	5	5	0	0	0	0
To restrain dissipation of assets by respondent	3	3	0	1	1	0	2	2	0
To defend Board's jurisdiction	9	8	1	5	4	1	4	4	0
To assert proper standard for rejection in Bankruptcy Code	4	3	1	1	0	1	3	3	0
Action by other parties	53	49	4	21	21	0	32	28	4
To restrain NLRB from	39	35	4	14	14	0	25	21	4
Proceeding in R case	8	7	1	4	4	0	4	3	1
Proceeding in unfair labor practice case	26	23	3	5	5	0	21	18	3
Proceeding in backpay case	0	0	0	0	0	0	0	0	0
Other	0	0	0	0	0	0	0	0	0
Reviewing under 10(f) unreviewing order	5	5	0	5	5	0	0	0	0
To compel NLRB to	14	14	0	7	7	0	7	7	0
Issue complaint	4	4	0	2	2	0	2	2	0
Seek injunction	0	0	0	0	0	0	0	0	0
Take action in R Case	0	0	0	0	0	0	0	0	0
Comply with Freedom of Information Act [1]	7	7	0	4	4	0	3	3	0
Pay Attorneys fee under EAJA	1	1	0	0	0	0	1	1	0
To initiate contempt proceedings	1	1	0	1	1	0	0	0	0
To compel Board agent to appear as witness	1	1	0	0	0	0	1	1	0

[1] FOIA cases are categorized as to court determination on whether NLRB substantially prevailed.

Table 22.—Advisory Opinion Cases Received, Closed, and Pending, Fiscal Year 1982[1]

	Total	Number of cases			
		Identification of petitioner			
		Employer	Union	Courts	State boards
Pending October 1, 1981	0	0	0	0	0
Received fiscal 1982	6	5	1	0	0
On docket fiscal 1982	6	5	1	0	0
Closed fiscal 1982	5	5	0	0	0
Pending Sept. 30, 1982	1	0	1	0	0

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[1] See Glossary for definitions of terms.

Table 22A.—Disposition of Advisory Opinion Cases, Fiscal Year 1982[1]

Action taken	Total cases closed
	5
Board would assert jurisdiction	2
Board would not assert jurisdiction	0
Unresolved because of insufficient evidence submitted	0
Dismissed	3
Withdrawn	0

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[1] See Glossary for definitions of terms.

Table 23.—Time Elapsed for Major Case Processing Stages Completed, Fiscal Year 1982; and Age of Cases Pending Decision, September 30, 1982

Stage	Median days
I. Unfair labor practice cases:	
A. Major stages completed—	
1. Filing of charge to issuance of complaint	48
2. Complaint to close of hearing	251
3. Close of hearing to issuance of administrative law judge's decision	132
4. Administrative law judge's decision to issuance of Board decision	170
5. Filing of charge to issuance of Board decision	633
B. Age [1] of cases pending administrative law judge's decision, September 30, 1982	262
C. Age [1] of cases pending Board decision, September 30, 1982	456
II. Representation cases:	
A. Major stages completed—	
1. Filing of petition to notice of hearing issued	9
2. Notice of hearing to close of hearing	13
3. Close of hearing to—	
Board decision issued	313
Regional director's decision issued	21
4. Filing of petition to—	
Board decision issued	193
Regional director's decision issued	35
B. Age [2] of cases pending Board decision, September 30, 1982	253
C. Age [2] of cases pending regional director's decision, September 30, 1982	38

[1] From filing of charge.

[2] From filing of petition.

Table 24.—NLRB Activity Under the Equal Access to Justice Act, Fiscal Year 1982

I. Applications for fees and expenses before the NLRB:	
A. Filed with Board	49
B. Hearings held	0
C. Awards ruled on:	
1. By administrative law judges:	
Granting	2
Denying	15
2. By Board:	
Granting	0
Denying	17
D. Amount of fees and expenses in cases ruled on by Board:	
Claimed	$261,111
Recovered	0
II. Applications for fees and expenses before the circuit courts of appeals:	
A. Awards ruled on:	
Granting	0
Denying	8
B. Amounts of fees and expenses recovered pursuant to court award	0

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Table 15C.—Geographic Distribution of Decertification Elections Held in Cases Closed, Fiscal 1981—Continued

Georgia	122	45	32	12	1	0	77	13,158	11,921	5,112	4,530	553	23	6	6,809	3,015
Florida	173	65	48	13	1	3	108	11,958	10,560	4,542	3,164	1,103	48	227	6,018	3,194
South Atlantic	675	276	195	64	7	10	399	53,647	47,699	20,993	16,837	3,282	233	641	26,706	13,662
Kentucky	102	44	25	15	2	2	58	8,135	7,339	3,137	1,539	865	539	194	4,202	2,300
Tennessee	133	50	24	24	1	1	83	11,435	10,374	4,154	2,791	1,350	2	11	6,220	2,614
Alabama	65	27	19	3	4	1	38	7,346	6,757	3,205	2,840	75	171	119	3,552	2,934
Mississippi	44	23	19	3	1	0	21	4,557	4,287	2,082	2,025	48	9	0	2,205	1,796
East South Central	344	144	87	45	8	4	200	31,473	28,757	12,578	9,195	2,388	721	324	16,179	9,644
Arkansas	42	23	11	12	0	0	19	4,432	4,007	1,875	933	942	0	0	2,132	1,471
Louisiana	90	32	22	7	1	2	58	6,907	8,152	3,234	2,661	407	7	159	4,918	1,126
Oklahoma	72	33	26	6	1	0	39	4,495	4,124	2,037	1,761	208	68	0	2,087	2,400
Texas	161	64	44	18	0	2	97	12,676	11,430	5,080	3,662	1,185	124	109	6,350	3,969
West South Central	365	152	103	43	2	4	213	30,510	27,713	12,226	9,017	2,742	199	268	15,487	8,966
Montana	32	16	5	11	0	0	16	699	615	310	154	144	12	0	305	387
Idaho	31	7	1	3	1	2	24	787	702	272	71	140	6	55	430	171
Wyoming	18	5	2	2	0	1	13	517	450	166	46	101	0	19	284	102
Colorado	99	45	34	8	1	2	54	4,703	4,178	1,972	1,731	120	5	116	2,206	1,679
New Mexico	25	11	9	2	0	0	14	629	577	263	191	72	0	0	314	182
Arizona	81	41	20	20	1	0	40	5,644	4,861	2,363	1,379	957	27	0	2,498	1,955
Utah	24	10	9	1	0	0	14	1,617	1,452	610	575	33	2	0	842	537
Nevada	39	18	12	5	0	1	21	2,233	1,900	1,028	768	246	1	13	872	1,089
Mountain	349	153	92	52	3	6	196	16,829	14,735	6,984	4,915	1,813	53	203	7,751	6,102
Washington	226	107	75	25	2	5	119	9,705	8,242	4,012	2,941	613	144	314	4,230	3,752
Oregon	90	35	24	9	1	1	55	2,515	2,148	939	742	134	20	43	1,209	784
California	822	380	226	111	16	27	442	50,716	43,611	22,465	13,125	5,839	1,334	2,167	21,146	23,179
Alaska	23	13	12	1	0	0	10	555	478	294	239	55	0	0	184	306
Hawaii	59	36	20	3	10	3	23	2,102	1,593	831	469	107	213	42	762	1,153
Guam	1	1	1	0	0	0	0	79	76	63	63	0	0	0	13	79
Pacific	1,221	572	358	149	29	36	649	65,672	56,148	28,604	17,579	6,748	1,711	2,566	27,544	29,253
Puerto Rico	76	39	17	3	0	19	37	7,558	6,892	2,692	964	126	68	1,534	4,200	1,855
Virgin Islands	13	7	5	2	0	0	6	505	365	242	235	7	0	0	123	344
Outlying Areas	89	46	22	5	0	19	43	8,063	7,257	2,934	1,199	133	68	1,534	4,323	2,199
Total, all States and areas	6,656	3,019	1,866	829	123	201	3,637	403,837	352,903	166,965	115,449	30,790	8,212	12,514	85,938	47,353

The States are grouped according to the method used by the Bureau of the Census, U.S. Department of Commerce.